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No. 08-800

Supreme Court, U.S.
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In The

Supreme Court of the United States

LUKE P., a minor, by and through his parents and next friends, JEFF and JULIE P.,

Petitioners,

v.

THOMPSON R2-J SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the substantive requirements of a "free appropriate public education" under the Individuals with Disabilities Education Act Amendments of 1997 have superseded the meaning of an appropriate education as interpreted by *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), under the Education for All Handicapped Children Act of 1975.

2. Whether the standard by which the courts of appeals review the district court's ultimate determinations in cases under the Individuals with Disabilities Education Act, including the determination of the appropriateness of a child's individualized education program, for which there is a four-way split among the Federal Courts of Appeals, is a question of fact or a mixed question of law and fact that must be reviewed for clear error.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are identified in the caption.

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OPINIONS BELOW

The impartial hearing officer's unpublished decision is reprinted in the appendix at App. at 99-135. The administrative law judge's unpublished decision is reprinted in the appendix at App. at 58-98. The district court's unpublished decision is available at 2007 U.S. Dist. LEXIS 47043 (D. Colo. Jun. 27, 2007), and is reprinted in the appendix at App. 30-57. The published decision of the Court of Appeals is reported at 540 F.3d 1143 (10th Cir. 2008), and is reprinted at App. 1-29. The denial of rehearing *en banc* is reprinted at App. 136-137.

STATEMENT OF JURISDICTION

The Court of Appeals issued its judgment and opinion on August 29, 2008. App. at 2. The Court of Appeals denied Petitioners' petition for rehearing *en banc* by Order dated September 25, 2008. App. at 136. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the following statutory provisions is set out in the appendix at App. 138-148: 20 U.S.C. §§ 1400, 1401, 1412, and 1414.

STATEMENT OF THE CASE

As a result of the Individuals with Disabilities Education Act Amendments of 1997 ("IDEA"), the Court's interpretation of the meaning of a "free appropriate public education" ("FAPE") under the Education for All Handicapped Children Act of 1975 ("Act" or "Act of 1975") in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), is no longer consistent with congressional intent. Furthermore, the Federal Courts of Appeals are severely divided on this critical issue of the standard for a FAPE for disabled students. Review is warranted to resolve the split among the circuit courts and to decide the important and recurring federal question regarding the substantive rights granted by the IDEA.

Review is also warranted to resolve a four-way split among the circuit courts as to the standard by which the courts of appeals review district court determinations under the IDEA. While the IDEA prescribes the standard for district court review of state administrative decisions, it is silent as to the standard of review to be applied by courts of appeals. The standard of review of district court findings is a threshold question in the analysis of whether a school district has or has not provided a disabled student with a FAPE, and is essential for determining the adequacy of a disputed IEP on appeal.

The factual findings and conclusions of law presented in this case are particularly appropriate to resolve the above-referenced conflicts and clarify the

confusion regarding both the meaning of an appropriate education under the IDEA and the applicable standard of review for appeals of IDEA cases. The facts presented here exemplify the substantive rights found within the gap of the competing circuits' standards for an appropriate education, and highlight the critical importance of the IDEA's substantive shift in the provision of an appropriate education from its statutory precursor. In addition, the Court of Appeals' application of a modified *de novo* standard to review the ultimate determinations made by the district court, unique among the circuit courts, exemplifies the four-way split among the circuits on this pivotal, and often times dispositive, issue.

I. STATUTORY BACKGROUND

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*[1] confers upon children with

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[1] The IDEA evolved from the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970). Congress substantially amended the statute with the passage of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. *See* Education of the Handicapped Act Amendments of 1990, Pub L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141-42. In 1997, Congress substantially amended the IDEA. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 88. The IDEA was amended again in 2004, Pub. L. No. 108-446, 118 Stat. 2647.

Unless otherwise noted, all citations to the IDEA are to the 1997 version of the statute because this is the version that was

(Continued on following page)

disabilities an "enforceable substantive right to public education" in those States that receive federal financial assistance under the IDEA. *Honig v. Doe*, 484 U.S. 305, 310 (1988). A State's eligibility for this financial assistance is conditioned on the State's development of policies that ensure children with disabilities are provided "full educational opportunity" and a "free appropriate public education," among other requirements. 20 U.S.C. § 1412(a)(1) and (2).

The stated purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living*." *Id.* § 1400(d)(1)(A) (emphasis added). At the outset, the IDEA declares its commitment to "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1). The IDEA recognizes the need to ensure that children with disabilities "meet developmental goals," and "have the skills and knowledge necessary to enable them – to be prepared to lead productive, independent, adult lives, to the maximum extent possible." *See id.* § 1400(c)(5)(E)(i) and (ii).

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in effect during the proceedings below. While the statute was amended in 2004, the amendments do not materially affect the arguments presented in this petition.

The IDEA defines a "free appropriate public education" (FAPE) as "special education and related services" that are provided at public expense; meet the standards of the state educational agency; include preschool, elementary, and secondary education; and are provided in conformity with an individualized education program (IEP). *Id.* § 1401(9).

The central vehicle for providing a FAPE is the IEP. *See Honig*, 484 U.S. at 311. The IEP is required to include, among other things,

> (ii) a statement of measurable annual goals, including benchmarks or short-term objectives . . . (iii) a statement of the special education and related services . . . that will be provided for the child (I) to advance appropriately toward attaining the annual goals . . . [and] (viii) a statement of . . . (II) how the child's parents will be regularly informed . . . of . . . (bb) the extent to which [the child's] progress is sufficient to enable the child to achieve the goals by the end of the year.

See 20 U.S.C. § 1414(d)(1)(A) (listing eight requirements for an IEP). The IDEA further requires that the IEP be reviewed "periodically, but not less than annually, to determine whether the annual goals for the child are being achieved," and to revise the IEP if there is evidence of any lack of expected progress. *Id.* §§ 1414(d)(4)(A)(i) and (ii)(I) (emphasis added).

The IDEA also sets forth specific requirements related to transition planning and transition services that must be included in a child's IEP. 20 U.S.C.

§ 1414(d)(1)(A)(vii). The IDEA defines transition services as "an outcome-oriented process, which promotes movement from school to post-school activities, . . . including independent living or community participation." 20 U.S.C. § 1401(30). The child's IEP must include specific statements of the child's transition service needs under the applicable components of the child's IEP. *Id.* § 1414(d)(1)(A)(vii). The purpose for these provisions is to focus attention on preparing the child for life after secondary school. *See* Federal Regulations Implementing the 1997 IDEA Amendments, 34 C.F.R. Appendix A to Part 300, III.

Parents who believe the school district has defaulted on its obligation to provide their child with a FAPE may withdraw their child from the public school and place the child in a private school and seek reimbursement for the costs associated with the private educational placement from the school district. *School Comm. of Burlington v. Department. of Educ. of Mass.*, 471 U.S. 359, 369 (1985); *see* 20 U.S.C. § 1412(a)(10)(C)(ii) (payment for education of children enrolled in private schools without consent of or referral by the school district). Parents are entitled to reimbursement if: 1) the school district's IEP calling for placement in a public school is inappropriate; and 2) the private placement is appropriate. *Burlington*, 471 U.S. at 369; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 9 (1993) (holding that a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education

under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA, but does not meet all of the requirements under IDEA.).

The IDEA provides an elaborate set of "procedural safeguards" that includes the right to "an impartial due process hearing" to resolve disputes between school officials and parents regarding the educational placement of the child and the provision of a FAPE to the child. 20 U.S.C. § 1415(b) and (f).[2] Any party aggrieved by the findings and decision made at the state administrative level may obtain judicial review in either state or federal court by filing a civil action. *Id.* § 1415(i)(2)(A). Upon the filing of a civil action, the district court receives the administrative record, hears additional evidence if requested by a party, and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." *Id.* The IDEA is silent on the standard for appellate review of district court factual findings and conclusions of law.

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[2] The IDEA provides for a one-tier or two-tier due process hearing system, to be determined by State law or the State educational agency (SEA). § 1415(f)(1). Colorado law provides for a two-tier system. 1 C.C.R. 301-8, § 2220-R-6.03. A hearing officer conducts the hearing and issues a written decision. *Id.* The aggrieved party has the right to appeal the hearing officer's decision to the Colorado Office of Administrative Courts who conducts the review on behalf of the SEA. *Id.*

II. FACTUAL BACKGROUND[3]

Luke P., born in 1994, suffers from autism[4] and mental retardation.[5] For kindergarten and first grade, Luke attended Niwot Elementary School, a public school in the St. Vrain Valley RE-1J School District in Colorado. Luke's family moved to Berthoud, Colorado located in the Thompson R2-J School District (School District) in 2002 and enrolled Luke in Berthoud Elementary School as a second grade student.

It was discovered early on that Luke, like many children with autism, experienced great difficulty with generalization.[6] While Luke was able to learn a particular skill in a given environment with a certain person, if one of the variables was changed he lost

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[3] The Factual Background is taken primarily from the district court's "Background" section found at App. 31-41, except where indicated.

[4] The federal regulations to the IDEA define autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement of repetitive activities and stereotyped movements, resistance to environmental change or daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.7(c)(1)(i)

[5] Mental retardation is a frequent co-morbid condition with autism. *See* App. at 102.

[6] Generalization in this context is defined as the ability to apply a skill or behavior learned in one setting to another setting (with differing distractions and stimuli) or ability to apply a learned skill or behavior in similar situations.

that skill and had to be re-taught it. For example, while Luke might be able to learn a skill such as washing his face with a given teacher at school, he might not be able to do it with a different person present or at home.

Like many children with autism, Luke's disability inhibited him from retaining knowledge and skills that he had learned unless they were reinforced through constant repetition. App. at 63. This pattern is referred to as regression. *Id.* Several of Luke's teachers noted that Luke lost some of the progress he made over each weekend due to regression, and that a significant part of the Monday class was spent on reconnecting and reinforcing previously learned material or skills.

In addition, Luke had significant self-care issues both at school and at home. According to School District records, as of December 2003 Luke could spontaneously indicate the need to use the bathroom only two to three times in a forty-five day period; was completely unable to use a fork; could not button or unbutton a shirt or pants or engage a zipper; and was unable to show his like or dislike of new foods. At home, Luke experienced sleep problems, including staying up at night, refusing to sleep in a bed, and engaging in destructive behaviors. In addition, Luke refused to eat all but a very limited number of foods, including yogurt, crackers, and croutons.

At school, Luke exhibited significant maladaptive behaviors, including screaming, squawking, laying on

the floor and flailing his arms and legs, and clearing the desk or pushing or throwing away unwanted items. This dysfunctional behavior was routine and occurred in all of his instructional settings. Luke exhibited similar unwanted behaviors at home and in the community.

Concerned with the increasing severity of Luke's behaviors (and his growing size and strength), Luke's parents began to seek other educational options in late 2003, including the Boston Higashi School (BHS), a residential school that specializes in educating children with autism. They also consulted with experts in the education of children with autism who evaluated Luke and observed him at school. These experts informed the Parents that Luke had lost previously mastered skills, had regressed in verbal communication, had regressed in his ability to be independent, was unable to regulate his behavior, and his maladaptive behaviors were impairing his ability to learn at school.

On December 16, 2003, the Parents and School District officials met for Luke's Triennial IEP Meeting. At the meeting, Luke's parents presented a list of goals that they wanted included in Luke's IEP. However, Luke's father stated he did not think these goals were attainable at Berthoud Elementary School and that a residential placement was needed. Luke's parents requested that the School District agree to place Luke at BHS. The School District refused.

Shortly after the IEP meeting, Luke was accepted at BHS and was enrolled in January 2004. In early 2005, Luke's parents filed a complaint for a due process hearing to obtain a decision on whether the December 16, 2003 IEP (the "disputed IEP") offered Luke a free appropriate public education as required by the IDEA and whether the School District was required to reimburse them for the costs associated with Luke's educational placement at BHS.

At the time of the due process hearing, after 16 months at BHS, Luke had increased his ability to self-regulate his behavior; could communicate with single words and practiced sentences; could wash his face and brush his teeth with assistance; was toilet trained; slept through the night in a bed, in an open bedroom with three other boys his age; could eat a wider variety of foods with utensils; and could dress and undress himself.

At the due process hearing, there was significant dispute as to Luke's academic and developmental progress while at Berthoud Elementary School. App. at 37-39. The School District argued that Luke had met or made progress towards several objectives contained in his prior IEP, which was evidence of educational progress. The Parents presented expert testimony that the limited progress reflected in the prior IEP was on skills he had previously mastered and that those skills were not observed functionally; i.e., Luke was unable to use or apply any of these skills outside of the classroom within which the skills were taught. Several experts testified that due to the

nature and severity of Luke's disability, a residential placement was needed in order for him to obtain any educational benefit.

III. PROCEDURAL HISTORY

A. Administrative Proceedings.

1. Due Process Hearing – Tier I.

Following a five-day due process hearing, the impartial hearing officer ("IHO") concluded that the disputed IEP was not reasonably calculated to provide Luke educational benefits. The IHO found that while Luke had made some progress in public school, the disputed IEP failed to address Luke's problems with regression and contained no strategies to enable Luke to generalize skills so that he could apply this progress in any other contexts. The IHO also found that Luke would derive no benefit from attaining goals and objectives in school if he could not replicate any of these skills anywhere else. App. at 124. The IHO described "these skills" as "the most basic ingredients to social functioning, such as eating, sleeping, dressing, toilet training, communicating, and proper behavior." App. 124-125. The IHO concluded that the disputed IEP failed not because its goals were inadequate, but because they could not be achieved outside of a residential placement. Because the need for residential placement was related to Luke's educational needs, the IHO held that the school district was responsible for the costs associated with Luke's education at BHS.

2. State Level Review – Tier II.

On appeal by the School District, the administrative law judge ("ALJ") affirmed. The ALJ found that while Luke had made progress on some of his IEP goals, he was unable to transfer any of these skills to any other environments and this inability to generalize prevented Luke from performing the most basic human tasks. App. at 85. According to the ALJ, because the weight of the evidence showed that Luke could not learn these foundational skills outside of a residential placement, the IEP developed by the school district did not provide a FAPE. The ALJ concluded that "Without a specific strategy or plan to enhance the possibility or probability that L.P. will be able to avoid regression and to generalize what he learns so that he might achieve some benefit from all the education offered to him, the December 2003 IEP cannot and does not meet the requirements of the IDEA." App. at 88.

B. Court Proceedings.

1. United States District Court.

The district court affirmed the ALJ's decision on appeal by the School District. The district court recognized that "The threshold issue in this case is whether the December 2003 IEP was adequate." App. at 46. The legal standard applied by the district court to determine the adequacy of the disputed IEP was "'whether the IEP was reasonably calculated to enable [the student] to receive educational benefits.'"

Id., *quoting Urban v. Jefferson County Sch. Dist. R1*, 89 F.3d 720, 726 (10th Cir. 1996).

Upon yet another independent review of the administrative record, the district court found "that [the] IEP and placement recommended by the District in the [December 2003] IEP was inadequate to confer more than a *de minimis* educational benefit on Luke." App. at 48. The district court reasoned that Luke's inability to generalize the most basic life skills, coupled with the disputed IEP's failure to adequately address this issue, supported the conclusion that the IEP was not reasonably calculated to enable Luke to obtain an appropriate education.

The district court recognized that there was a "significant dispute as to Luke's academic and developmental progress while at Berthoud Elementary." App. at 37. The district court agreed with the IHO and the ALJ that while Luke's IEPs showed that he had made some progress under those documents, the evidence showed that "[Luke] was not able to generalize his learning experiences from school to home and other contexts" and that "Luke regressed in key areas, including with respect to communication skills and behavioral control." App. at 37-38. The district court found that whatever educational progress Luke made was meaningless if there was no strategy in place to enable Luke to generalize those most fundamental life skills. App. at 48.

The inadequacy of the disputed IEP was premised on several specific factual findings made by the district court, including: that Luke's disruptive behaviors and lack of basic daily living skills "prevented meaningful access to educational benefits" (App. at 48); that Luke's lack of adaptive behavior skills "which affect his behavior and long-term functioning, clearly impact his ability to get any benefit from what he learns at school" (App. at 49); and that "Luke's behavioral problems were interfering with his ability to obtain educational benefits, as it appeared that the staff at his school had to spend an inordinate amount of time responding to his tantrums and resistance behavior, which were not improving." (App. at 48).

2. Tenth Circuit Court of Appeals.

The Court of Appeals for the Tenth Circuit reversed the decision of the district court on appeal by the School District. In its review of the district court's factual findings, the Court of Appeals rejected the application of the clear error standard of review and instead applied a modified *de novo* standard – applying the same principles of review as did the ALJ and the district court. App. at 15, n. 6.

Relying on *Rowley*, the Court of Appeals explained that the IDEA has only a particularly narrow purpose: "a statutory scheme focused on and limited to enhancing disabled students' *access* to public

education."[7] App. at 18 (emphasis added), *citing Rowley*, 458 U.S. at 192. The Court of Appeals emphasized that the IDEA "established only procedures to guarantee disabled students *access* and opportunity, not substantive outcomes." App. at 19 (emphasis added), *citing Rowley*, 458 U.S. at 192.

The Court of Appeals rejected the Parents' argument that the IDEA requires the provision of educational benefits designed to prepare a child for appropriate post-school outcomes, such as independent living. App. at 17-18. Although the Court of Appeals recognized that "generalization is a critical skill for self-sufficiency and independence," it nevertheless held that "generalization skills need not always be included in, and progress on such skills is not necessary to ensure, a compliant IEP." App. at 21. The Court of Appeals emphasized that "No educational value or goal, including generalization, carries special weight under IDEA." App. at 25.

In examining whether the disputed IEP provided Luke a FAPE under the IDEA, the court limited its inquiry to whether there was evidence in the record that Luke had made "some progress" on goals in the IEP. App. at 22-26. The Court of Appeals announced that if a school district "has found a formula that can

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[7] The Court of Appeals rejected the argument that the meaning of FAPE had changed under the IDEA noting that the same textual definition for FAPE survived from its statutory precursor. App. at 13, n. 5.

reasonably be expected to generate some progress on that student's IEP goals," nothing further is required under the IDEA. App. at 26. A child's inability to use or apply skills outside of the classroom within which they are taught is not required to show educational benefit. App. at 22.

Because the Court of Appeals found, upon an independent review of the administrative record, evidence that Luke had made some progress on some IEP goals, the court reversed the district court's decision which found that Luke could not obtain an educational benefit under the disputed IEP.

The Parents filed a petition for rehearing *en banc* which was denied on September 25, 2008. App. 137.

REASONS FOR GRANTING THE PETITION

Conflicting judicial interpretations of the statutory proviso "*free appropriate public education*" under the amended IDEA, including conflicting judicial interpretations of the Court's standard for this term announced in *Rowley* under the IDEA's statutory precursor, reflect the widespread uncertainty, lack of uniformity, pervasive confusion, unpredictability, and direct conflict regarding the standard used to gauge whether a student with disabilities is receiving a FAPE under the IDEA and whether a school district is in compliance with the requirements of the IDEA.

The central issue in the vast majority of the cases brought under the IDEA is whether the school district has provided a disabled student with a free appropriate public education. The standard for determining an "appropriate education" was issued by *Rowley* some twenty-six years ago in light of the then-controlling Education of All Handicapped Children's Act of 1975. Vastly divergent and conflicting interpretations of this standard have evolved among the Federal Courts of Appeals over the ensuing two and a half decades.

Compounding this conflict among the circuit courts, amendments to the statute took effect in 1997 that have called into question the continued validity of the FAPE standard announced by this Court in *Rowley*. At least one circuit court has ruled that the *Rowley* standard for FAPE has been superseded by the 1997 amendments to the IDEA. *See N.B. v. Hellgate Elem. Sch.*, 541 F.3d 1202, 1213, n. 3 (9th Cir. 2008).

This conflict and confusion regarding the requirements of the IDEA leave state hearing officers, administrative law judges, district courts and courts of appeals struggling to fairly and uniformly resolve crucial special education disputes.[8] This leaves states,

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[8] According to the Office of Special Education Programs, more than 15,000 complaints for due process hearings were filed last year. *See* U.S. Dep't of Educ., Office of Special Education Programs, Data Analysis System (DANS), OMB #1820-0677: *Report of Dispute Resolution Under Part B of the Individuals*

(Continued on following page)

school districts, and parents of children with disabilities with great uncertainty as they attempt to assess their respective rights and assess the value in pursuing costly litigation.

It is unacceptable, in a nation such as ours that is governed by a uniform federal special education statute, that similarly situated children who happen to live in different states are not entitled to receive the same measure of educational benefits. Without intervention by this Court, uniform administration of the IDEA will be undermined by conflicting decisions of the Federal Courts regarding the substantive requirements of the IDEA. The time is ripe for this Court to resolve the conflict that exists among the severely divided Federal Courts of Appeals and clarify the meaning of an appropriate education under the IDEA.

Conflict and uncertainty also pervade the Federal Courts of Appeals' standard used for reviewing the ultimate determinations made by district courts in appeals of IDEA cases. There is currently a four-way split among the Federal Courts of Appeals regarding the standard applied to review district court determinations concerning the adequacy and appropriateness of an IEP – the central issue in the vast majority of IDEA cases. Absent a single, uniform standard of review for appeals of IDEA cases in

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with Disabilities Education Act, 2006-07. (Data updated as of July 15, 2008), *at* https://www.ideadata.org/TABLES31ST/AR_7-3.xls.

federal and state courts of appeals, these appellate courts will continue to reach conflicting conclusions on a diversified local basis as to the very nature of the issue on appeal and how it should be addressed.

I. Because the Court of Appeals' Construction of the IDEA Under Pre-Amendment Standards Presents Conflicts on Important and Recurring Questions of Federal Law that are Preventing Accurate and Uniform Administration of the IDEA, Review is Warranted.

A. Because the Court of Appeals' Interpretation of the *Rowley* Standard for an Appropriate Education Presents a Conflict Among the Federal Courts of Appeals Regarding the Governing Law for the Determination of a FAPE Under the IDEA, Review is Warranted.

There is considerable conflict, confusion, lack of uniformity, and uncertainty regarding the application of *Rowley's* "appropriate education" standard which is predicated on providing a disabled student an "educational benefit." The vast conflict among Federal Courts of Appeals has led to disparate results for disabled students in different parts of the country and has caused substantial litigation between school districts and parents of children with disabilities.

One line of decisions, that include the Courts of Appeals for the Second, Third, Fifth, Sixth and Ninth Circuits, has interpreted *Rowley* to require that a

student's IEP provide a "meaningful educational benefit" to satisfy the IDEA. *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2nd Cir. 1997) (an "IEP must be reasonably calculated to provide some 'meaningful' benefit."); *Polk v. Central Susquenhanna*, 853 F.2d 171, 184 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) ("we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit."); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) ("In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'"); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005) ("we agree that the IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue."); *Seattle Sch. Distr. No. 1 v. B.S.*, 82 F.3d 1493, 1501 (9th Cir. 1996) (same).

In rejecting the competing "some benefit" standard in favor of the "meaningful benefit" standard, the court in *Polk* reasoned that "some benefit" ostensibly could allow a *de minimis* benefit. *Polk*, 853 F.2d at 184. The court held that the Act requires a satisfactory IEP to provide "significant learning" and confer "meaningful benefit." *Id.* at 184. In *Deal*, the court explained that "at the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency. . . ." *Deal*, 392 F.3d at 864.

The "meaningful benefit" standard applied by the Court of Appeals for the Ninth Circuit includes, in addition to the foregoing, a requirement that the disabled child is able to "make productive use of what she learned." *B.S.*, 82 F.3d at 1501.

A second line of decisions, that includes the Courts of Appeals for the First, Fourth, Eighth, and Eleventh Circuits, has interpreted *Rowley* to require that a student's IEP provide only "some benefit." *See, e.g., Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *A.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004); *Blackmon v. Springfield*, 198 F.3d 648, 659 (8th Cir. 1999); *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

In *JSK*, the court rejected the argument that educational benefits must be "meaningful." *JSK*, 941 F.2d at 1572. Rather, when measuring whether a disabled student has received educational benefits, "courts must only determine whether the child has received the basic floor of opportunity." *Id.* at 1573. According to the Eleventh Circuit, "While a trifle might not represent 'adequate' benefits," anything more than "some" is not required. *Id.* at 1572-73.

A third standard was adopted by the Court of Appeals for the Tenth Circuit in *Luke P. v. Thompson R2-J School District*. *See* App. at 29. According to the Tenth Circuit, the standard is whether "some progress" is shown on IEP goals and not whether the child is able, overall, to obtain educational benefits. *Id.* In *Luke P.*, the court found that "a school district

is not required to provide every service that would benefit a student if it has found a formula that can reasonably be expected to generate some progress on that student's IEP goals." App. at 26. The Court of Appeals held that the IDEA "much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make *some progress* towards the goals within that program. . . . [T]his *standard* has been met here." App. at 29 (emphasis added).

Finally, the Ninth Circuit has recently ruled that the *Rowley* standard for an appropriate education had been superseded by Congress' enactment of the 1997 amendments to the IDEA. *N.B.*, 541 F.3d at 1213, n. 3. In *N.B.*, the court noted that the district court had "applied both the pre-amendment *Rowley* 'some educational benefit' standard and the heightened 'meaningful benefit' standard" under the amended IDEA *Id.* at 1213 (footnotes omitted). The court recognized that "In 1997, Congress amended the IDEA, obligating schools to provide children with disabilities with more than 'some educational benefit,' as prescribed in *Rowley*." *Id.* at 1213, n. 3. The court found that the 1997 amendments to the IDEA "represented a significant shift in the focus from the disability education system prior to 1997," that required a heightened standard for determining whether a disabled student was provided a FAPE. *Id.*

Legal commentators have also written about this deep split among the Federal Courts of Appeals, its deleterious effects on parents and school districts,

and have voiced the need for the Supreme Court to resolve this conflict. *See, e.g.*, Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley?, 39 Suffolk U. L. Rev. 1 (2005).

Because the Court of Appeals' decision reflects the vast conflict, confusion and lack of uniformity in the application of the IDEA's requirement of a free appropriate public education to a child with disabilities, review is warranted.

B. Because the Court of Appeals' Interpretation of the Requirements of an Appropriate Education Under the Act of 1975 Instead of the IDEA Raises Important and Recurring Federal Questions Regarding the Governing Law for the Determination of a FAPE Under the IDEA, That Have Not Been, But Should Be, Settled By This Court, Review is Warranted.

As this Court has previously recognized, education is perhaps the most important function of state and local governments and must be considered "in the light of its full development and its present place in American life throughout the Nation." *Brown v. Board of Educ.*, 347 U.S. 483, 492-93 (1954). Societal expectations for children with disabilities to achieve independence and gain self-sufficiency, educational progress, and productive employment in adulthood have greatly increased since the enactment of the Act

in 1975 and *Rowley's* interpretation of the Act in 1982.[9] This shift in expectations is based, in large part, on the ensuing decades of research, the experience gained through the implementation of the Act, and the wide-spread inclusion of children with disabilities in the school system. *See* 20 U.S.C. §§ 1400(c)(3) and (5).

The IDEA, itself, proclaims that the original goal of "access" announced in *Rowley* has been achieved.[10] *See* § 1400(c)(3). Congress recognized that the modern barrier to the education of children with disabilities is not access, but low expectations and inadequate outcomes. *Id.* In 1997, Congress passed comprehensive amendments that elevated the purpose of the IDEA from simply access to a public education to "improving educational results" and "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1).

While the IDEA retained the Act's textual definition of FAPE, this should not be construed as an

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[9] *See Reauthorization of the Individuals With Disabilities Education Act: Hearing on S. 216 Before Senate Comm. on Labor and Human Services*, 105th Cong. 88 (1997) (statement of Senator Jim Jeffords) ("After 22 years, I think it is appropriate to acknowledge that . . . our expectations for children with disabilities have changed, and the expectations we place on each other as educators and parents have changed.").

[10] In fact, the IDEA recognizes the growing problem of over identification of children with disabilities who may not be learning disabled. § 1400(c)(8).

endorsement of *Rowley's* construction of the meaning of FAPE or an indication of Congress' intent in amending the Act. The strength for this assertion is derived from the *Rowley* decision itself and its use of the nexus between legislative intent, statutory purpose, and procedural requirements of the Act to discern the substantive meaning of this "cryptic" term – FAPE. *Rowley*, 458 U.S. at 187-89; *see also*, *Johnson v. Transportation Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (rejecting the assumption that congressional inaction necessarily connotes acquiescence of prior statutory interpretations made by the Court).

Because the definition of FAPE is primarily procedural, increasing substantive rights under the IDEA is effectuated by increasing its procedural requirements. Therefore, in amending the IDEA to achieve its goal of increased educational benefits, greater expectations and educational outcomes, it was unnecessary for Congress to alter the already flexible textual definition of FAPE.

The express legislative purpose of the IDEA has fundamentally changed since the Act of 1975. *See* 20 U.S.C. § 1400(d)(1). No longer is the purpose merely to make a free appropriate public education available. Rather, one of the primary purposes of the IDEA is "to . . . prepare [children with disabilities] for employment and independent living." § 1400(d)(1)(A). The federal regulations interpreting the 1997 amendments to the IDEA expound on this new focus:

> [O]ne of the key purposes of the IDEA Amendments of 1997 was to 'promote improved education results for children with disabilities through . . . educational experiences that prepare them for later education challenges and employment.' (H.Rep. No. 105-95, p. 82 (1997); S.Rep. No. 105-17, p. 4 (1997)).
>
> Thus, throughout their preschool, elementary, and secondary education, the IEPs for children with disabilities must . . . focus on providing instruction and experiences that enable the child to prepare himself or herself for later educational experiences and for post-school activities, including formal education, if appropriate, employment and independent living.

34 C.F.R. Appendix A to Part 300, III.

This fundamental shift in purpose is reflected in the significant changes made to the substantive requirements of an IEP. Almost every new requirement for an IEP is a manifestation of Congress' stated purpose of achieving greater expectations and educational outcomes for children with disabilities.[11] For example:

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[11] The Act sets forth the requirements for an IEP as:

> a written statement for each handicapped child [developed at a meeting by specified participants] . . . which statement shall include (A) a statement of the present levels of educational performance of such

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1. The statement of the child's present levels of educational performance now requires a specific indication of "how the disability affects the child's involvement and progress in the general curriculum." § 1414(d)(1)(A)(i)(I).[12]

2. The statement of annual goals has been revised to include "a statement of measurable annual goals" related to enabling the child to "be involved in and progress in the general curriculum." § 1414(d)(1)(A)(ii)(I).

3. The statement of specific educational services to be provided to the child must now specifically include the "program modifications or supports for school personnel" that will be provided for the child to: (a) advance appropriately toward attaining the annual

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> child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis whether instructional objectives are being achieved.

20 U.S.C. § 1401(19) (1976).

Compare the Act's definition and requirements with the extensive new requirements for an IEP set forth in the IDEA, reproduced in full in the appendix at App. 143-147.

[12] The 2004 amendments add the requirement that this statement also include the child's present levels of "functional performance."

goals, (b) be involved in and progress in the general curriculum, to participate in extracurricular activities and non-academic activities. §§ 1414(d)(1)(A)(iii)(I) and (II).[13]

4. The statement of the extent to which the child will not participate in regular educational programs must now include a written explanation. § 1414(d)(1)(A)(iv).

5. A new statement is required identifying modifications necessary to allow the child to participate in state or school district student achievement assessments. § 1414(d)(1)(A)(v).

6. A new statement is required for needed transition services[14] focused on those areas that will enable the child to prepare for post-school activities

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[13] The 2004 amendments add the requirement that the special education and related services be "based on peer-reviewed research to the extent practicable."

[14] "Transition services" are defined as "a coordinated set of activities for a child with a disability that (A) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (B) is based on the individual student's needs, taking into account the student's strengths, preferences, and interests; and (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation." § 1401(30).

including, as appropriate, formal education, employment, and independent living. §§ 1414(d)(1)(A)(vi) and (vii).

7. The statement of objective criteria and evaluation procedures for determining whether the child is achieving the IEP's objectives must now include: (a) the method of measuring the child's progress toward annual goals, and (b) the method of informing parents, such as through periodic report cards, of their child's progress toward the annual goals and the extent to which the progress is sufficient to enable the child to achieve the annual goals. § 1414(d)(1)(A)(viii).

In addition, the IEP now must be reviewed at a minimum on an annual basis and must be revised at that time to address, among other things, "any lack of expected progress toward the annual goals." § 1414(d)(4).

Each of these provisions furthers Congress' intent to ensure that each child's IEP is calculated to confer measurable progress in order to prepare children with disabilities for appropriate post-school activities.

As discussed *supra* at p. 23, at least one Federal Court of Appeals has recognized that the 1997 amendments to the IDEA have called into question the continued validity of *Rowley* by "obligating schools to provide children with disabilities with more than 'some educational benefit,' as prescribed by *Rowley*." *N.B.*, 541 F.3d at 1213, n. 3. Several legal

commentators have expressed similar views and have voiced their opinion that the Supreme Court should resolve this issue in order to bring uniformity and certainty to the lower courts and administrative tribunals. *See, e.g.*, Dixie S. Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & Educ. 367 (2008); Scott F. Johnson, *Reexamining* Rowley: *A New Focus in Special Education Law*, 2003 BYU Fduc. & L. J. 561 (2003); Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunities for Children With Disabilities*, 103 Dick. L. Rev. 613 (1999).

Absent intervention by this Court, courts and administrative tribunals will continue to undermine the purpose and intent of the IDEA by concluding *incorrectly* that children with disabilities are entitled only to access to a public education, rather than any measure of educational opportunity that is designed to prepare them for appropriate post-school activities. Because the 1997 amendments to the IDEA have called into question the continued validity of *Rowley* by obligating schools to provide children with disabilities with more than "some educational benefit," as prescribed by *Rowley*, review is warranted.

II. Because the Court of Appeals' Conclusion that District Court Factual Findings are Reviewed Under a Modified *De Novo* Standard Directly Conflicts with Other Federal Courts of Appeals Which Hold that District Court Findings, Including Whether an IEP is Adequate and Appropriate Under the IDEA, are Reviewed For Clear Error, Review is Warranted.

Review is warranted to resolve a four-way split among the circuits as to the standard by which the courts of appeals review district court determinations under the IDEA. The standard of review of district court findings is a threshold question in the analysis of whether a school district has or has not provided a disabled student with a FAPE, and is essential for determining the adequacy of a disputed IEP on appeal. *See Oberti v. Board of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993).

While the IDEA provides guidance as to the role of district courts in their review of state administrative hearing decisions,[15] it is silent as to the court of

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[15] The IDEA permits "[any] party aggrieved by the findings and decision" of the state administrative hearing "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A). In reviewing the civil complaint, the district court is directed to "receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(i)(2)(B). In determining

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appeals' role in reviewing decisions made by district courts. The following four-way split of authority has developed regarding the scope of the court of appeals' inquiry in appeals brought under the IDEA:

One line of decisions holds that the determination of whether an IEP is adequate and appropriate under the IDEA is a question of fact that must be reviewed for clear error. *See, e.g., Carlisle Area Sch. v. Scott P. by & Through Bess P.*, 62 F.3d 520, 526 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996) ("We review the district court's determination of the 1992-93 IEP's appropriateness, a factual question . . . under a clearly erroneous standard. . . .") (citations omitted); *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 309 (4th Cir. 2005) ("Whether an IEP is appropriate and thus sufficient to discharge a school board's obligations under the IDEA is a question of fact . . . reviewed under a clear error standard.") (citations omitted).

A second line of decisions holds that the determination of whether an IEP is adequate and appropriate under the IDEA is a mixed question of law and fact that must be reviewed for clear error, absent a

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the adequacy and appropriateness of an IEP, the district court conducts a bench trial on the administrative record in which it makes an evaluative judgment, applying "a legal standard to a particular set of facts." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 990 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991), *quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

mistake in law. *See, e.g., Roland M.*, 910 F.2d at 990-991 ("Clear-error review seems peculiarly apt in the section 1415(e)(2) milieu, as gauging the adequacy and appropriateness of IEPs is a chore inevitably presenting questions whose determination 'require[ ] delicate assessments . . . [that] are peculiarly ones for the trier of fact.'") (citations omitted); *Board of Educ. of Community Consol. School Dist. No. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 715-716 (7th Cir. Ill. 1991), *cert. denied*, 502 U.S. 1066 (1992) ("in the absence of a mistake of law, the district court's answer to this mixed fact/law question is only reviewable for clear error.") (citations omitted); *L.T. v. Warwick Sch. Comm.*, 361 F.3d 80, 84 (1st Cir. 2004) (same).

A third line of decisions holds that the determination of whether an IEP is adequate and appropriate under the IDEA is a mixed question of law and fact that must be reviewed *de novo*. *See, e.g., Michael F.*, 118 F.3d at 252; *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987).

Alone among the Federal Courts of Appeals, the Tenth Circuit applies a modified *de novo* standard of review to the district court's determination of an IEP's adequacy – the same standard employed by the district court. *See Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 928 (10th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995); *see also* App. at 15, n. 6. ("We recognize, though that while we are bound to apply a modified *de novo* standard of review, our rule represents the distinct minority position among circuit

courts, [citations omitted]."); *but see Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 19 (10th Cir. 1985) ("the critical question for our consideration is whether the district court's finding that the [school district] offered [the child] a free appropriate education is clearly erroneous.").

Notwithstanding the foregoing conflict, Federal Courts of Appeals (other than the Tenth Circuit) uniformly hold that factual findings made by the district court, such as findings that a disabled child is incapable of obtaining educational benefits under a given IEP, are reviewed for clear error. *See, e.g., Ash v. Lake Oswego School Dist., No. 7J*, 980 F.2d 585, 588 (9th Cir. 1992) ("We review for clear error the district court's factual determination that Christopher was incapable of deriving educational benefit outside a residential placement during the 1989-90 school year."); *McKenzie v. Smith*, 771 F.2d 1527, 1535 (D.C. Cir. 1985) ("The [district] court determined that based on the preponderance of the evidence Christopher's educational and emotional needs could not be segregated, and that a residential placement was therefore appropriate. Although the evidence could also support a contrary conclusion, we cannot say that the district court's factual findings were clearly erroneous."); *Michael F.*, 118 F.3d at 252 ("The district court's findings of underlying fact, such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error."). The Tenth Circuit is, again, alone among the Federal Courts of Appeals that apply a modified *de novo*

standard of review to purely factual findings. *See Murray*, 51 F.3d at 282.

Here, the Court of Appeals acknowledged that the dispositive issue on appeal was whether the disputed IEP was reasonably calculated to enable Luke to receive educational benefits. The district court found that the "IEP and the placement recommended by the District in the IEP was inadequate to confer more than a de minimis educational benefit on Luke." App. at 48. This factual finding was based on the district court's determination that "Luke's behavioral issues were impacting his ability to derive the educational benefits in the IEP" and that the nature and severity of Luke's disabilities "prevented meaningful access to educational benefits" under the disputed IEP. *Id.*

Because the Court of Appeals' application of a modified *de novo* standard for reviewing the district court's dispositive factual findings in IDEA appeals conflicts with other Federal Courts of Appeals, for which there is a four-way split among the circuit courts, review is warranted. The conflict regarding the standard of review to be applied by courts of appeals in IDEA cases has not been, but should be, settled by this Court.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari to resolve the questions presented.

Respectfully submitted,

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Counsel for Petitioners

December 19, 2008

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THOMPSON R2-J SCHOOL DISTRICT,

Plaintiff-Appellant,

v.

LUKE P., by and through his parents and next friends, JEFF and JULIE P.,

Defendants-Appellees.

NATIONAL SCHOOL BOARDS ASSOCIATION; COLORADO ASSOCIATION OF SCHOOL BOARDS; COLORADO BOCES ASSOCIATION; COLORADO BOARDS OF COOPERATIVE EDUCATIONAL SERVICES ASSOCIATION; COLORADO SPECIAL EDUCATION DIRECTORS CONSORTIUM; AUTISM SPEAKS,

Amici Curiae.

No. 07-1304

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 05-cv-2248-WDM-CBS)

(Filed Aug. 29, 2008)

W. Stuart Stuller (Alyssa C. Burghardt with him on the briefs), of Caplan and Earnest LLC, Boulder, Colorado, for Plaintiff-Appellant.

Jack D. Robinson of Spies, Powers & Robinson, P.C., Denver, Colorado, for Defendants-Appellees.

Kathleen Sullivan, Colorado Association of School Boards, Francisco M. Negrón, Jr., National School Boards Association, Alexandria, Virginia, and Darryl Farrington, Semple, Miller, Mooney & Farrington, P.C., Denver, Colorado, filed an amici curiae brief in support of Plaintiff-Appellant.

Gary S. Mayerson, Director, Autism Speaks, Federal Legal Appeals Project, Mayerson & Associates, New York, New York, filed an amicus curiae brief in support of Defendants-Appellees.

Before **BRISCOE**, **GORSUCH**, Circuit Judges, and **PARKER**, Senior District Judge.*

GORSUCH, Circuit Judge.

Jeff and Julie P. contend that the Thompson R2-J School District failed to provide their autistic son Luke with the educational services guaranteed to him by the Individuals with Disabilities Education Act ("IDEA") because of the difficulty he experiences in generalizing skills learned in the school setting to the home and other environments. They also assert that, given the severity of some of the manifestations of Luke's disability, only a private residential school can provide Luke with an adequate education. Having withdrawn Luke from the public school he attended in order to enroll him in a private residential program, the family now seeks reimbursement of Luke's tuition costs from the school district. Because every factfinder to have assessed this case has found that Luke was making progress in the public school environment on the educational goals individually formulated for him by the school district and his parents, we are constrained to reverse.

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* The Honorable James A. Parker, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

I

A

Born in 1994, Luke was diagnosed with autism at the age of two.[1] When he entered kindergarten at Niwot Elementary School in Colorado's St. Vrain Valley School District in the Fall of 2000, Luke began receiving special educational services from that school district in accordance with the provisions of IDEA. *See* 20 U.S.C. § 1400 *et seq.* IDEA is a federal statute aimed at helping states provide disabled children with a free and appropriate public education ("FAPE"). Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program ("IEP") calculated to meet the eligible student's specific educational needs. *See id.* § 1414(d). In addition, IDEA specifies that disabled children should be educated in the "least restrictive environment," meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled. *Id.* § 1412(a)(5)(A).

In accordance with these requirements, Luke's special education teacher at Niwot Elementary, Margaret Wilson, led the effort in formulating an IEP for Luke and working with him through his kindergarten and first grade years. Luke's IEPs for

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[1] As did the district court, we omit Luke's surname in deference to the family's privacy.

kindergarten and first grade included objectives relating to communication skills, self care (including toilet training), independence and motor skills, social interaction and play skills, and academic functioning. They also specified that Luke would split time between the general classroom and a special education classroom.

Ms. Wilson's evaluations indicate that Luke made significant progress and achieved many of his IEP goals during the time she worked with him, *see* Impartial Hearing Officer's ("IHO") Decision at 4-5; Administrative Law Judge's ("ALJ") Decision at 4, though she also reported that Luke, like many other autistic children, had difficulty generalizing skills, or, in other words, "apply[ing] the skill[s] to different people or different environments," Answer Br. at 42; *see* IHO Decision at 4. Luke's difficulty in generalizing the skills he learned in school to the home is borne out by discrepancies revealed in an adaptive behavior skills test that was administered to Luke both in the classroom and in his home. *See* IHO Decision at 4.

In the Fall of 2002, Luke's family moved to Colorado's Thompson R2-J School District, and Luke enrolled in second grade at Berthoud Elementary. In anticipation of the transfer, the special education teacher at Berthoud visited Niwot and communicated with Ms. Wilson, as well as Luke's parents, in order to make plans for a smooth transition. A new IEP was adapted from the IEPs that had been developed at

Niwot, and Luke continued to make progress on his goals and objectives during his second grade year.

Despite the apparent progress at school during his kindergarten through second grade years, Luke's life away from school during the same time paints a much different picture, as his autism manifested itself in various behavioral problems that were especially severe at home. Luke was unevenly tempered, often displaying inappropriate and sometimes violent behavior at home and in public places such as grocery stores and restaurants. He developed various sleep problems – going to bed at odd hours, waking up frequently at night, and refusing to sleep in a bed. Luke also developed a habit of intentionally spreading his nighttime bowel movements around his bedroom. In addition, although Luke became toilet trained at school by the time he was in first grade, he was not able to transfer this skill to the home and other settings away from school.

Understandably, these behaviors took a tremendous toll on Luke's family. Worried that, without intervention, Luke's behavior would become only more dangerous as he continued to grow physically, the family began looking into residential placement options. Through research on the Internet, they discovered the Boston Higashi School ("BHS"), which specializes in education of children with autism. Students enrolled in the residential program at BHS live at the Boston campus for 44 weeks out of the year and are supervised 24 hours a day by BHS educators and staff. ALJ Decision at 7. Luke's family, along with

Ms. Wilson, who kept in touch with the family and retained an interest in Luke's education, visited the BHS campus in late Fall 2003 and filled out an application for Luke's admission during the visit.

At around the same time, Luke's family asked Diane Osaki, an occupational therapist who runs a private day school for autistic children, as well as Ms. Wilson, to observe and assess Luke while at school. Ms. Osaki observed Luke at Berthoud Elementary for a three hour period, interviewed Luke's parents, and reviewed charts and video footage of Luke. She reported a number of concerns in the school's work with Luke, including the facts that staff sometimes unknowingly reinforced Luke's unwanted behaviors, that Luke had made little or no progress on many of his goals and objectives, and that Luke had "[g]reat difficulty generalizing skills taught in one environment to natural daily living routines." Osaki Report, R. Vol. V. at 864. Ms. Osaki also expressed concern that Luke had "increase[d] the strength and number of challenging and unwanted behavior[s]" and that, since transferring to Berthoud Elementary, Luke had apparently regressed in certain respects. *Id.* Ms. Osaki did, however, note many areas in which Luke was improving and stated that "throughout his early education, Luke has made good progress in all areas of development." *Id.* Ms. Osaki recommended, among other things, "12 month programming to reduce the risk of regression," increased consistency in training of school staff, and additional parent training. *Id.* at 866. For her part, Ms. Wilson met with Luke and

administered the Autism Diagnostic Observation Schedule test. She reported to Luke's parents that some skills that Luke had previously mastered during his time working with Ms. Wilson at Niwot Elementary were diminished or were no longer present. *See* Wilson Letter, Dec. 11, 2003, R. Vol. V. at 858.

On December 16, 2003, Luke's parents met with his teachers and other school officials for an IEP review meeting. At the meeting, the parents presented a list of goals they had developed based on recommendations from Ms. Osaki and asked that the goals be included in Luke's IEP for 2004. They also stated, however, that they felt the goals were not attainable at Berthoud Elementary and that the only appropriate placement for Luke would be a residential program tailored to autistic children, such as that offered by BHS. The school district officials expressed openness to revising Luke's IEP to include the parents' proposed goals and to working with Ms. Osaki to improve their special education program. But they also expressed their belief that the proposed goals were attainable at Berthoud Elementary and that residential placement was not necessary. At the meeting's conclusion, the school district officials stated that they planned to revise Luke's IEP and then submit a new draft to the parents.

Two days after the IEP meeting, on December 18, BHS accepted Luke's application for enrollment. The next day, on December 19, counsel for Luke's family sent the school district a letter stating that the family intended to remove Luke from Berthoud Elementary,

enroll him at BHS, and, pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii), seek from the school district reimbursement of the costs of Luke's education at BHS. Luke officially enrolled as a residential student at BHS on January 12, 2004.

On January 15, 2004, the school district sent to Luke's family a revised, final IEP for 2004. The IEP proposed by the school district incorporated virtually all of the goals requested by the parents, but it called for continued placement at Berthoud Elementary rather than the residential placement requested by the parents. Luke's family rejected the IEP, and Luke remained enrolled at BHS.

B

In due course, the family sought an IDEA due process hearing in the Colorado Department of Education, pursuant to 20 U.S.C. § 1415, petitioning for a determination that the school district's IEP failed to provide Luke with a FAPE; that a residential placement was necessary for Luke; and that the school district should reimburse the family for Luke's education expenses at BHS. Following a five-day hearing, the impartial hearing officer ("IHO") held in favor of the family, finding that, while the "evidence in general . . . suggest[s] that [Luke] made some progress in public school prior to [his removal], due to his inability to generalize his learning experiences at school to home and community environments, [Luke] was not able to apply this progress in those other contexts."

IHO Decision at 14. On this basis, the IHO held that a residential placement was necessary for Luke and that the school district was obliged under IDEA to pay the costs of that placement.

On appeal before the Colorado Office of Administrative Courts, an Administrative Law Judge ("ALJ") agreed with the IHO that, although Luke "had achieved nearly a quarter of the goals and objectives in his IEP[,] . . . was making slow [but] steady progress toward others[,] . . . . [and] overall . . . was advancing in his goals at school[,] [t]he problem remained . . . [that Luke] was unable to transfer any of his learned skills and use them in environments outside of school." ALJ Decision at 8.

In response to these adverse decisions, the school district brought suit in federal district court, seeking review and reversal of the ALJ's and IHO's judgments. The district court, however, ultimately agreed with the administrative decisions that Luke's generalization deficiency warranted his placement in a residential program, and that the school district must reimburse the family for the residential placement costs at BHS. The school district now appeals.

II

Pursuant to Congress's direction, to obtain reimbursement for private tuition at BHS Luke's parents must show, at a minimum, that the school district violated IDEA and that the education provided by BHS is reasonably calculated to enable Luke to

receive educational benefits. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004); 20 U.S.C. § 1412(a)(10)(C)(ii). In turn, our precedent indicates that Luke's parents can show a violation of IDEA in one of two ways. They can either show that the school district failed to provide Luke with a free and appropriate public education; or they can show that, despite the school district's provision of a free and appropriate public education, it failed to provide that education, to the maximum extent appropriate, in the least restrictive environment.[2] *Nebo*, 379 F.3d at 975 n.13; 20 U.S.C. § 1412(a)(5).

Beginning with their initial request for a due process hearing before an IHO, Luke's parents have confined themselves to alleging the first type of violation – contending that the school district failed "to provide Luke [P.] with a free and appropriate public education." R. Vol. II at 240.[3] The burden of

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[2] The school district contends that Luke's parents must also show that BHS is the least restrictive environment in which Luke can receive educational benefits, citing to us *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 536-37 (3d Cir. 1995); *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 86 (D.C. Cir. 1991); *DeLullo v. Jefferson County Bd. of Educ.*, 71 F. Supp. 2d 554, 559 (N.D. W.Va. 1998). *But see Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001). We have no need to pass on this argument, however, because the parents' claim in this case falters on the antecedent question whether the school district violated IDEA.

[3] In a single sentence in their brief on appeal, Luke's parents might possibly be understood to argue that, even if the school district provided Luke a FAPE, it did not do so in the

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proof in such a challenge rests with the party claiming a deficiency in the school district's efforts, here Luke's parents. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1026 (10th Cir. 1990). In what follows, we first outline the contours of what a FAPE requires and then assess the two arguments Luke's parents advance for finding that the school district in this case failed to provide one.

A

How do we know when a school district has or has not provided a disabled student with a FAPE? To be sure, the term is hardly self-defining. Fortunately, however, the statute and Supreme Court afford some additional direction, indicating that we must ask, more specifically, whether Luke's December 2003 IEP was "reasonably calculated to enable [him] to receive educational benefits," *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *see also Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125 (10th Cir. 2008). If the IEP was so calculated, the school

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least restrictive environment. Answer Br. at 54. Under our controlling precedent, this suggestion, "appearing only in a fleeting sentence" in an appellate brief, is too inadequately developed to be meaningfully addressed and is deemed waived. *United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008).

district can be said to have provided a FAPE; if not, then not.[4]

The Supreme Court has further explained that this standard is not an onerous one. "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make . . . access meaningful. . . . [T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley,* 458 U.S. at 192.[5] So, for example, the Court found no support in the text or history of the Act for the proposition that Congress sought to guarantee educational services sufficient to "maximize each child's potential." *Id.* at 198. Instead, we are told, Congress sought only to require a "'basic floor of opportunity,'" *id.* at 200, aimed at providing

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[4] We generally also must inquire whether the school district has complied with the procedural requirements of IDEA. *See Rowley,* 458 U.S. at 206-07. Here, however, that question is not at issue before us because Luke's family does not dispute the propriety of the process used by the school district in formulating Luke's December 2003 IEP.

[5] *Rowley* involved an analysis of IDEA's statutory precursor, the Education of the Handicapped Act, but the same textual language has survived to today's version of IDEA. *Compare Rowley,* 458 U.S. at 187-89 (quoting EHA definitions) *with* 20 U.S.C. § 1401(9), (26), (29) (current IDEA definitions). Indeed, the Supreme Court has recently cited approvingly *Rowley*'s discussion of the meaning of FAPE in *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-01 (2007).

individualized services sufficient to provide every eligible child with "*some* educational benefit," *id.* (emphasis added). We are also reminded that the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. From this direction, we have concluded that the educational benefit mandated by IDEA must merely be "more than *de minimis*." *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996). Finally, because the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, our precedent instructs that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998).

In assessing whether Luke's parents have carried their burden of establishing that his December 2003 IEP fails to meet these standards, we apply a somewhat unique standard of review. "Unlike the deferential review typically afforded to administrative adjudication of statutory claims, Congress requires district courts to apply a modified *de novo* standard

when reviewing agency disposition in the IDEA context." *Garcia,* 520 F.3d at 1125; 20 U.S.C. § 1415(i)(2)(C). Specifically, the district court must (1) receive the record of the administrative proceedings, (2) hear additional evidence at the request of a party, and (3) base its decision on the preponderance of evidence. 20 U.S.C. § 1415(i)(2)(C). "At the same time, though the statute specifies that review is *de novo,* the Supreme Court has interpreted the requirement that the district court receive the administrative record to mean that 'due weight' must be given to the administrative proceedings, the fact findings of which are 'considered prima facie correct.'" *Garcia,* 520 F.3d at 1125. We apply these very same principles in our own review of the district court's judgment. *Id.* "Thus, we actually apply a modified *de novo* review, which entails an independent review of the evidence." *T.S. v. Indep. Sch. Dist. No. 54,* 265 F.3d 1090, 1093 (10th Cir. 2001); *Nebo,* 379 F.3d at 974 ("[T]he district court conducted a bench trial on the administrative record which this court reviews *de novo,* applying the same IDEA standard that was employed by the district court.").[6]

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[6] Although Luke's parents urge us to review the district court's factual findings for clear error, citing *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 252 (5th Cir. 1997), this court has already rejected application of the clear error standard and, of course, one panel of this court cannot overrule the decision of a prior panel. *Erickson v. Albuquerque Pub. Schs.,* 199 F.3d 1116, 1120 n.6 (10th Cir. 1999). We recognize, though, that, while we are bound to apply a modified *de novo*

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B

Luke's parents contend that his December 2003 IEP was not reasonably calculated to provide him with educational benefits primarily because it failed to address adequately his inability to generalize functional behavior learned at school to the home and other environments. The ability to generalize, Luke's parents insist, is "fundamental," Answer Br. at 43, and without it "learning does not exist," *id.* at 42. Absent the ability to generalize skills learned at school, particularly basic self help and social skills, they submit Luke's education is effectively worthless. And the only setting in which Luke is certain to improve his generalization skills, his parents maintain, is a residential setting not provided for in the challenged IEP. The school district responds that, as

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standard of review, our rule represents the distinct minority position among circuit courts, *see, e.g., Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1229 (8th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). Our modified *de novo* approach also runs counter to the general standard of review suggested in Fed. R. Civ. P. 52(a). *En banc* reconsideration of our standard of review may well be appropriate at some point. In this case, however, the standard of review is not dispositive. As discussed below, *see* Part II.B.2, the tribunals that have previously considered this case all found that Luke was making some progress, and so whether we apply a modified *de novo* review or afford greater deference to findings of prior factfinders, the outcome would be the same. Our disagreement with the district court that ably and carefully considered this matter is limited solely to the legal question what consequences follow under IDEA's terms from its factual findings.

a matter of law, generalization across settings is not required by IDEA so long as Luke can be said to be making *some* progress in school, and cites cases from the Eleventh and First Circuits, as well as various district courts, so holding.[7] We are constrained to agree with the school district and our sister courts. Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with appellees that IDEA always attaches essential importance to it.

1

In support of their argument about the essential legal importance of generalization skills, appellees point to and rely heavily on language in the Act's statements of purpose indicating that Congress sought to help prepare disabled students for self-sufficient "independent living." *See* 20 U.S.C. § 1401(34); 20 U.S.C. § 1400(c)(1) (referring to "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency"). Luke's parents submit that without an assurance that students will be able to generalize skills from the

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[7] *See Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001); *Gonzalez v. Puerto Rico Dept. of Educ.*, 254 F.3d 350 (1st Cir. 2001); *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991); *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F. Supp. 2d 1152 (N.D. Cal. 2007), *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457 (D.N.J. 1997); *Hall v. Shawnee Mission Sch. Dist.*, 856 F. Supp. 1521 (D. Kan. 1994).

school environment to the home – whether learning how to sit quietly, following directions, or otherwise – the sort of self-sufficiency and independence Congress expressly wished for disabled persons like their son will always be beyond reach.

While we are sympathetic to Luke's parents' desire to see their child thrive, the difficulty with their argument is that Congress did not provide in IDEA a guarantee of self-sufficiency for all disabled persons, and the most authoritative arbiter of congressional intent has already reached this conclusion. In *Rowley,* the Supreme Court expressly considered and rejected the notion that "self-sufficiency" is "the substantive standard which Congress imposed on the States." 458 U.S. at 201 n.23. The Court explained that "[n]oticeably absent from the language of [IDEA] is *any* substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189 (emphasis added). Rather, while the promotion of self-sufficiency was surely among Congress's purposes in enacting IDEA, the Court explained that Congress proceeded to select a rather particular means for advancing that purpose – a statutory scheme focused on and limited to enhancing disabled students' access to public education. *See id.* at 192; *id.* at 201 n.23 ("We thus view these references in the legislative history [to the concept of self-sufficiency] as evidence of Congress's intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.").

Specifically, Congress mandated that the States provide "individual education programs" for all eligible disabled students, but then left the content of those programs entirely to local educators and parents, requiring only that they include "a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and meet the child's "other educational needs." 20 U.S.C. § 1414(d)(1)(A)(i)(II). In other words, Congress established procedures to guarantee disabled students access and opportunity, not substantive outcomes. *See Rowley,* 458 U.S. at 192; *see also* Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?,* 14 Harv. J.L. & Pub. Pol'y 483, 495 (1991) (discussing how IEPs do not guarantee particular outcomes because "[i]f the IEP were a contract obligating the school to achieve the specified goals and objectives, districts would set the most minimal of goals"). Congress further prescribed that IEPs should generally be addressed to and carried out in the least restrictive environment available – usually the public school classroom. 20 U.S.C. § 1412(a)(5)(A). And while not mandating what their content should be, Congress emphasized the need for a careful and open process in the creation of IEPs: "We think that the congressional emphasis upon full participation of concerned parties throughout the

development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley,* 458 U.S. at 206. So, as the court in *San Rafael* aptly explained, "participation in the education process under the IDEA [ ] is the vehicle [Congress chose] for assisting individuals in achieving the goal of independence – [the Act] is not a guarantee that all children will achieve that level of independence." 482 F. Supp. 2d at 1161. To the extent that a child's problems pertain only outside the educational realm, then, "other resources [not IDEA] must be looked to." *Gonzalez,* 254 F.3d at 353 (internal citation omitted).

Our reading of the Act on this score is in harmony with the holdings of other circuits who have reached this question before us. In *Gonzalez,* a family claimed, much as here, that while their autistic son, Gabriel, might have been making modest academic progress at school, placement in a private residential program was necessary because he was not generalizing skills learned at school and his tantrums at home made him a potential safety threat. Without discounting the struggles Gabriel's parents faced, the First Circuit held that IDEA was not designed "to remedy a poor home setting or to make up for some other deficit not covered by the Act." *Gonzalez,* 254 F.3d at 353 (internal citation omitted). Similarly in *Devine,* the Eleventh Circuit rejected private placement for an autistic student, holding that "generalization

across settings is not required to show an educational benefit," and that school districts must do no more than provide an IEP that enables the student to "mak[e] measurable and adequate gains in the classroom." 249 F.3d at 1293. *See also L.G. ex rel. B.G. v. Sch. Bd. of Palm Beach County,* 255 F. App'x 360, 365-67 (11th Cir. 2007) (denying claim by parents for reimbursement of residential placement costs where child was making progress in classroom but not generalizing the progress outside of school); *San Rafael,* 482 F. Supp. 2d 1152, *D.B.,* 985 F. Supp. 457; *Hall,* 856 F. Supp. 1521; Terry Jean Seligmann, Rowley *Comes Home to Roost: Judicial Review of Autism Special Education Disputes,* 9 U.C. Davis J. Juv. L & Pol'y 217 (2005) (discussing rise of autism rates and IDEA cases); *see* Brief of *Amici Curiae* Colorado Association of School Boards et al. (arguing that self-sufficiency is not the substantive standard imposed by IDEA).

While we hold that generalization skills need not always be included in, and progress on such skills is not necessary to ensure, a compliant IEP, we remain mindful that the Supreme Court has cautioned against "establish[ing] any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Rowley,* 458 U.S. at 202. For this reason, we note that at least one other court has suggested that in some instances difficulty generalizing skills may be so severe that it prevents a student from receiving *any* educational benefit. *See Gonzalez,* 254 F.3d at 353. In such situations, our

sister court held, an IEP "must address such problems in some fashion, even if they do not warrant residential placement." *Id.* As discussed below, however, because the student before us was indisputably making *some* progress, we need not reach this question today.[8]

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In this case, we simply cannot say that, as of December 2003, Luke's generalization difficulties precluded him from making some progress at Berthoud Elementary. Critically, every single factfinder in this case found that Luke was progressing on his existing IEP goals in public school. By way of example, the IHO determined that "the evidence in general and the December 16, 2003, IEP in particular suggest that Luke made some progress in public school prior to that date." IHO Decision at 14; *see also id.* at 6 ("[T]he succession of IEPs developed for [Luke] during his kindergarten through second grade years reveal

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[8] Luke's family cites to us a number of district and state court cases in which district courts held that residential placement was appropriate. But in each instance the student's generalization deficiencies or regression tendencies were so severe that they essentially prohibited *any* learning or progress on the student's IEP goals. *See Ash v. Lake Oswego Sch. Dist. No. 7J*, 766 F. Supp. 852 (D. Or. 1991); *S.C. ex rel. C.C. v. Deptford Twp. Bd. of Educ.*, 248 F. Supp. 2d 368, 376-80 (D.N.J. 2003); *Drew P. v. Clarke County Sch. Dist.*, 676 F. Supp. 1559, 1561 (M.D. Ga. 1987); *Cremeans v. Fairland Local Sch. Dist.*, 633 N.E.2d 570, 579-80 (Ohio App. 1993).

no highly remarkable difficulties with his special education in public schools."); *id.* ("[A]t school . . . [Luke] seemed to make adequate progress."). The ALJ similarly found that "[d]uring kindergarten through his second grade year at Berthoud, [Luke] made progress with his special education and was meeting many of the goals and objectives in his IEPs." ALJ Decision at 4. Finally, the district court found that "a comparison of his third grade IEP and kindergarten IEP demonstrates that Luke progressed in several areas," Dist. Ct. Op. at 7, and held that the IHO's and ALJ's findings that "Luke made some progress on the goals contained in [his IEPs] . . . is supported by a preponderance of the evidence on the record." *Id.*[9]

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[9] Although Luke's family contends that any factual findings indicating that Luke was making progress in school are clearly erroneous in light of alleged regression in some areas, these findings are well-supported by the record and we perceive no contrary facts to rebut the *prima facie* presumption of correctness that these findings are owed under our modified *de novo* review standard. After all, as the ALJ noted, Luke had "achieved nearly a quarter of the goals and objectives in his IEP and [ ] was making slow [but] steady progress toward others." ALJ Decision at 8. Moreover, the ALJ specifically determined that a report documenting the alleged regression upon which the family seeks to rely was "evidence of his inability to generalize, not necessarily conclusive proof that he had lost skills he had previously learned." *Id.* at 7. Even the family's own witness, Ms. Osaki, stated in her report to the family – just shortly before the family withdrew Luke from Berthoud Elementary – that "throughout his early education, Luke made good progress in all areas of development." Osaki Report, R., Vol. V. at 864.

Such past progress is, of course, not dispositive of the controlling question whether, going forward, the December 2003 IEP was reasonably calculated to confer some educational benefit, but it does strongly suggest that, modeled on prior IEPs that had succeeded in generating some progress, the December 2003 IEP was reasonably calculated to continue that trend. Moreover, given IDEA's emphasis on the importance of the process by which IEPs are created, *see supra* Part II.B.1, the fact that the school district incorporated into the new IEP virtually every one of the substantive goals recommended by Luke's parents and their experts – many of which expressly relate to improving Luke's generalization skills – is telling.[10] This is not the usual IDEA dispute where the student and parents allege that their concerns have gone unheeded or unaddressed in the IEP process.[11]

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[10] For example, the school district included as an objective that Luke "demonstrate understanding/use of size, spatial and quantity concepts" and that he be able to "generalize use of concepts to novel activities." R. Vol. IV, at 704. Similarly, the IEP called for Luke to "spontaneously indicate the need to use the bathroom once per day, with generalization to all environments." *Id.* at 706. The school district also included a comprehensive behavior support plan, designed to address many of the negative behaviors that Luke engaged in at school and at home. *See id.* at 714-16.

[11] To be sure, Luke has made significant strides at BHS, and BHS may well provide a superior education to the one available in the public school system. But Congress simply did not guarantee children "a potential-maximizing education," *Rowley*, 458 U.S. at 197 n.21, and in evaluating Luke's IEP we

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Indeed, both the IHO and the ALJ found the December 2003 IEP to represent a "monumental and genuine effort on the part of the District to improve [Luke]'s performance in a number of areas affected by his autism." ALJ Decision at 8; *see also* IHO Decision at 20. Affording due weight to the findings of the IHO, ALJ, and district court that (i) Luke was making some educational progress, and (ii) his December 2003 IEP was generated in a manner that represented a monumental and genuine effort to continue such progress, we believe these findings compel, as a matter of law, the conclusion that the school district met its IDEA obligations in this case.

These tribunals reached a contrary judgment in this case only because, in their judgment, "whatever educational progress Luke made . . . was meaningless if there was no strategy to ensure that those skills would be transferred outside of the school environment." D. Ct. Op. at 16.[12] For reasons we have explained, however, this conclusion rests on a legal error. No educational value or goal, including generalization, carries special weight under IDEA. The fact that, by the admission of every factfinder in this case,

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are not entitled to give weight to his subsequent success in private school, *see O'Toole*, 144 F.3d at 701-02.

[12] *See also* ALJ Decision at 8 ("The problem remained . . . that despite his progress at school, [Luke] was unable to transfer any of his learned skills and use them in environments outside of school."); IHO Decision at 21 ("[Luke] will derive no benefit at all from attaining goals and objectives in school if he cannot replicate any of his accomplishments anywhere else.").

Luke *was* making some educational progress and had an IEP reasonably calculated to ensure that progress continued is sufficient to indicate compliance, not defiance, of the Act. In this respect, we think our case bears a certain resemblance to *Rowley*. There, the Supreme Court confronted a challenge to a school district's decision to deny a deaf student a sign language interpreter. Pursuant to her IEP, the student received the use of a hearing aid and some individualized instruction. *Rowley,* 458 U.S. at 184. In rejecting a claim by the student's parents that she was also entitled to a sign language interpreter, the Supreme Court did not question that an interpreter would be of great assistance, but explained that the student was making some progress without one, and that some progress was all the Act required. *Id.* at 210. The Court so held, moreover, over a dissent that – like the three prior tribunals in this case – would have found that "[t]he Act requires more" than simply that a student receive "some benefit." *Id.* at 214-15. The difficulties Luke faces in the classroom and at home are no doubt considerably greater in scope and severity than those faced by the student in *Rowley*. But the legal principle outlined there by the Supreme Court controls equally here: a school district is not required to provide every service that would benefit a student if it has found a formula that can reasonably be expected to generate some progress on that student's IEP goals.

C

Even if progress on generalization skills is not an inescapable component of all IEPs under federal law, Luke's parents suggest, alternatively, that Colorado law guarantees such progress. And because "[s]tate standards that impose a greater duty to educate disabled children, if they are not inconsistent with federal standards, are enforceable in federal court under the IDEA," *Fowler v. Unified Sch. Dist. No. 259,* 128 F.3d 1431, 1438 (10th Cir. 1997) (internal quotation omitted); 20 U.S.C. § 1407 (requiring state regulations to conform to federal law, but allowing the possibility for state regulations not required by federal law), the family asks that we hold the school district to the purportedly higher standard required by Colorado law.

As it happens, however, the state regulations cited by Luke's parents simply specify that the "delivery system" by which the state provides special education services "shall include . . . those services which enhance cognitive, communicative, physical and social-emotional development and teach students the skills critical to compensate for their disability . . . . [and] those services which are necessary to teach students to function independently or interdependently in current and future environments including school, home, employment and the community." 1 Colo. Code Regs. § 301-8, 2220-R-5.03(4) (2005). Far from giving any substantive definition to the sort of education that must be provided to every student on

an individual basis, let alone guarantee generalization skills are addressed, these regulations merely specify some of the various services that special education programs should make available as a general matter. The very same regulation, in an earlier section, actually defines "appropriate education" in terms that very much reflect the statutory text of IDEA and comport with *Rowley*'s holding that the educational benefits conferred under IDEA are highly individualized rather than standardized in any substantive way. *See id.* § 5.01(2) ("'Appropriate' education shall be the provision of educational services that meet the individual needs of children with disabilities as identified on the individualized educational programs (IEPs)."). We thus discern no educational standard imposed by state law that would guarantee the generalization of skills for all children.[13]

* * *

We sympathize with Luke's family and do not question the enormous burdens they face. Our job, however, is to apply the law as Congress has written it and the Supreme Court has interpreted it. Though IDEA is certainly evidence that Congress intends that States, acting through local school districts, provide

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[13] It appears that shortly after this case was briefed the Colorado Department of Education enacted changes to the state regulations in question. Neither party, however, has filed any documents with the court attempting to claim the benefit of any change, and so we treat any such arguments as waived.

assistance to disabled students and their families, the assistance that IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program. The findings of every factfinder in this case indicate that this standard has been met here. For this reason, we are constrained to reverse the district court's judgment and remand for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 05-cv-2248-WDM-CBS

THOMPSON R2-J SCHOOL DISTRICT,

Plaintiff,

v.

LUKE P., by and through his parents and next friends, JEFF and JULIE P.,

Defendants.

ORDER

Miller, J.

This case arises under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. §§ 1401-1485.[1] Plaintiff Thompson R2-J School District (the "District") has filed a complaint seeking review of a state administrative law judge's decision.[2] Upon consideration of the parties' written and oral arguments, as well as supplemental authority

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[1] The applicable statute was originally enacted as the Education of the Handicapped Act. Cases decided prior to the reenactment as the IDEA in 1990 refer to the statute by its former title.

[2] The issues have been briefed in a pleading styled as a motion for summary judgment, which is, in essence, an administrative appeal brief.

submitted after the close of briefing, I conclude that the administrative law judge's decision should be affirmed and the District's complaint dismissed.

Background

The parties are Luke P. ("Luke"), a minor student at all times relevant to this case, who appears through his parents, Jeff and Julie P. ("Parents"), and the District. They dispute whether the Act requires that the District pay the full costs of Luke's placement in an out-of-state private school. Parents removed Luke from the District in December 2003. They requested a due process hearing pursuant to 20 U.S.C. § 1415 on January 21, 2005. A five day hearing was held in June 2005 before a hearing officer, who issued his decision on July 8, 2005, finding that the District had failed to provide Luke with a free appropriate public education ("FAPE") and requiring the District to reimburse Parents for the costs of the private school placement. The District appealed the decision to the Office of the Administrative Courts. Following review, Administrative Law Judge ("ALJ") Michelle A. Norcross affirmed the hearing officer's decision.

The evidence at the due process hearing established the following background information (facts are undisputed unless noted):

Luke, born in 1994, has been diagnosed with autism and mental retardation. He attended kindergarten and first grade at Niwot Elementary in the St.

Vrain School District, where his special education teacher was Margaret Wilson. Margaret Wilson and the Niwot Elementary staff prepared two individualized education programs ("IEP") for Luke. Luke's family moved to the Thompson School District in 2002 and enrolled Luke in Berthoud Elementary School. Margaret Wilson met with the special education teacher at Berthoud Elementary, DeeAnn Wilson, and other efforts were made to ensure a smooth transition. Berthoud Elementary adapted the IEP from Niwot Elementary, which placed Luke in a special education class for part of the day and in the regular classroom with special education support.[3] Luke had opportunities to interact with typically developing peers in the classroom, at recess, and on the school bus. At both the Niwot and Berthoud schools, Luke received supplemental speech and occupational therapy.

At this time, Luke's autism and mental retardation affected his home and school life in a variety of ways. Luke's speaking vocabulary was limited (although he was capable of comprehending significantly more than he could express) and his social interactions were delayed. He had significant self care issues. Although he was basically toilet trained at school from the first grade, he was incontinent at home. In addition, he had sleep problems, including

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[3] The parties dispute whether Luke could have continued at Niwot Elementary even after his family's move to the Thompson School District.

staying up at night, refusing to sleep in a bed, and engaging in destructive behaviors. His parents had to lock him in his bedroom at night. Starting around age three or four, he had developed a habit of spreading night time bowel movements around his bedroom. His parents removed carpets, curtains, and furnishings from the bedroom and created special sleep garments to try to inhibit this behavior. In addition, Luke refused to eat all but a very limited number of foods, including yogurt, crackers, and croutons. If given other foods, he would engage in a temper tantrum. He would also behave inappropriately in public places. He needed nearly constant supervision and monitoring, requiring assistance from Luke's grandparents and hired attendants. The move to Thompson School District was in part because Luke's parents and grandparents decided to move into adjacent homes to assist with Luke's care needs.

Luke also had behavioral and learning issues at school. Like many autistic children, Luke had difficulty generalizing what he learned, that is, applying skills he had learned in one environment to another. Thus, while Luke might learn a skill such as washing his face at school, he might not be able to do it with a different person present or at home. Luke's teachers at Niwot Elementary noted that Luke also regressed in his skills; after the weekend, a significant part of the Monday class was spent on reconnecting and reinforcing previously learned material or skills. Luke exhibited significant avoidance or refusal behaviors at school, including screaming, squawking,

laying on the floor and flailing his arms and legs, and clearing the desk or pushing or throwing away unwanted items. In order to address some of these issues, Margaret Wilson had developed a behavior plan for Luke at Niwot Elementary and worked with Luke's family to implement structures and techniques in the home.

Luke's Berthoud Elementary IEP team developed a new IEP for him in December 2002. The plan contained goals addressing gross and fine motor skills, communication, sensory integration skills, self care skills (including face washing and feeding objectives, but not toileting as this had been achieved), independence in motor skills, academic functioning, and social interaction. The IEP did not include a behavior plan but the team apparently continued to apply Margaret Wilson's behavior plan. Margaret Wilson testified at the hearing she had told the Berthoud team at the transition meetings that a new behavior plan needed to be developed. The Berthoud team used several strategies to help Luke generalize skills, including moving tasks from a "work" desk, where he worked on tasks with assistance, to an "independent desk," where he worked without assistance, to the regular classroom. In addition, in response to expressed concerns by Luke's mother about Luke's behavior at home, DeeAnn Wilson visited the home and suggested making a picture schedule using computer icons, similar to what Luke used at school, and other strategies. However, other than these sporadic efforts, the IEPs developed at Berthoud

Elementary did not contain any support or training for Parents regarding Luke's behavioral, regression, or generalization problems.

Because of the increasing severity of Luke's behaviors (and his growing size and strength), Parents began to seek other educational and residential possibilities in late 2003. They consulted with Margaret Wilson, Luke's former special education teacher, and Diane Osaki, an occupational therapist who operates a private day school for children with autism.[4] Luke's family visited and applied for admission to the Boston Higashi School ("BHS"), a residential school, in October 2003. BHS specializes in educating children with autism and does not enroll any typically developing children.

In late 2003, Margaret Wilson administered the Autism Diagnostic Scale (ADOS). She wrote a letter to the family dated December 11, 2003, in which she reported several concerns, including that skills Luke had previously mastered were not present, that he used more primitive forms of communication than before, and that he was frequently out of his seat during the assessment. In addition, she had not been able to administer the test at first because he became extremely frustrated and distressed; as a result, she

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[4] Parents also consulted with a psychiatrist, who prescribed sedatives, but the sedatives were ineffective except in high doses. Parents also consulted social services about residential placements in the state but learned they would have to relinquish custody of Luke to pursue that option.

had to restart the assessment. Around the same time, Ms. Osaki observed Luke at Berthoud Elementary for a four hour period. She prepared a report for Parents, in which she noted numerous behavioral problems (crying, screaming, tantruming, and other resistance), some lasting up to 40 minutes, during what was reported to be a "typical" day. She also reported her evaluation that the staff at Berthoud Elementary were inadvertently reinforcing the negative behaviors. She opined that Luke had regressed in verbal communication and independence and was using unwanted behavior to avoid tasks and communicate basic needs. She recommended, *inter alia,* "12 month programming to reduce the risk of regression," and parent training.

On December 16, 2003, the parties met for the triennial IEP meeting. Both of Luke's parents attended, as well as Dee Ann Wilson, Beth Fraley (the regular education teacher), and other personnel. At the meeting, Parents presented a list of goals for the following year that they wanted included in Luke's IEP. However, Luke's father stated he did not think these goals were attainable in the present placement and that a residential placement was needed. The IEP staff requested the opportunity to revise the IEP using the list of goals created by Parents. They also began developing a new behavior plan to respond to Luke's problem behaviors. They requested a copy of Ms. Osaki's report to assist in responding to the issues she observed. Parents sent Ms. Osaki's report and the ADOS materials from Margaret Wilson to

BHS, but not the District. Just after the IEP meeting, Luke was accepted at BHS. On December 19, 2003, counsel for Parents sent a letter advising the school district that Parents intended to remove Luke from the District and enroll him at BHS. The final version of Berthoud Elementary's IEP incorporated most of the issues from Parents' list of goals and was sent to Parents on January 15, 2004; however, the plan did not include a residential placement.

There is significant dispute as to Luke's academic and developmental progress while at Berthoud Elementary. The hearing officer found that the IEPs demonstrated that Luke made some progress on the goals contained in those documents, but that he was not able to generalize his learning experiences at school to home and other contexts. This conclusion is supported by a preponderance of the evidence on the record and the parties do not dispute Luke's extreme difficulty with generalization. In addition, the hearing officer found that Luke's behavioral problems manifested at school and home and prevented his participation in the community and integration in society. This is also supported by a preponderance of the evidence. Several expert witnesses, found to be credible by the hearing officer, testified that Luke's disruptive behaviors were an impediment to his ability to obtain an education at Berthoud Elementary. The defendants contend that the IEPs demonstrate that the goals for Luke in the third grade were essentially the same as his kindergarten and first grade goals, showing little meaningful progress. I

disagree with this characterization; while some goals are similar, a comparison of his third grade IEP and kindergarten IEP demonstrates that Luke progressed in several areas. However, this is not inconsistent with a finding, supported by the testimony of Luke's father, Margaret Wilson and Ms. Osaki (who had assessed Luke when he was younger), that Luke had also regressed in key areas, including with respect to communication skills and behavioral control.

Margaret Wilson, Ms. Osaki, and Dr. Ellen Hanson, a psychologist, as well as other experts, testified that residential placement was needed because Luke's unique needs and maladaptive behaviors required a completely consistent and reinforcing approach available only in a residential setting with specialists in educating children with autism. This is so that appropriate behaviors would become completely automatic and engrained across environments. Several witnesses testified that the ability to self-regulate behavior, which Luke was lacking, was essential to any real academic progress. Margaret Wilson testified in particular that she felt the residential placement was needed, despite her general preference for non-residential education, because even after she and the family had tried very hard to apply consistent strategies at home and at school, the efforts were unsuccessful.

The District presented testimony from two expert witnesses, Dr. Phillip Strain and Dr. Glen Dunlap. Both opined that a residential placement was not necessary because the consistent behavioral

techniques Luke needed could be implemented in the home and regular school environment and because autistic children generally benefit from having interactions with typically developing children. These witnesses testified that the IEP prepared by the Berthoud team would provide an appropriate education to Luke. However, because neither of these experts had met or examined Luke, spoken with his parents or educators, or were aware of his sleeping and other self-care issues at home, the hearing officer gave their opinions less weight.

The parties also dispute how much progress Luke made after his time at BHS. Luke attends BHS for approximately 44 weeks per year, where he is supervised 24 hours a day, and the remaining eight weeks are spent with his family. The family visits are supported and monitored by BHS staff. It does not appear to be disputed that at the time of the due process hearing, Luke was toilet trained, could dress and undress himself, was eating a variety of foods, and was sleeping regularly in a bed, although he continued to engage in some challenging and resistive behaviors.

The hearing officer determined that educating Luke required addressing Luke's difficulty with generalizing learned skills, his tendency towards regression, his need to overcome social and communication difficulties, and his academic problems. The hearing officer also concluded that Luke's education required special emphasis on his daily life and self care skills, including sleeping, eating, toilet training,

and engaging in elementary communication and appropriate behaviors, which had to be functional outside of the school environment. Although the IEP developed by the Berthoud team addressed substantive aspect of his autism, social and communication problems, and mental retardation, the hearing officer opined that the skills would not be transferred and the IEP did not address Luke's problems with regression. The hearing officer noted that Luke "will derive no benefit at all from attaining goals and objectives in school if he cannot replicate any of his accomplishments anywhere else. The skills involved are not embellishments and frills. They are the most basic ingredients to social functioning, such as eating, sleeping, dressing, toilet training, communicating, and proper behavior."

The hearing officer found the evidence to be persuasive that only a residential placement would be adequate to create a reasonable chance of producing the result of self-sufficiency. The hearing officer concluded that the December 2003 IEP failed not because its goals were inadequate, but because they could not be achieved outside of a residential placement. The hearing officer also found that residential placement was the least restrictive appropriate environment for Luke, based on the evidence presented at the hearing. In addition, because the need for residential placement is related to Luke's educational needs, the District was required to reimburse Parents for Luke's education at BHS from January

12, 2004 until his placement is changed pursuant to law.

On administrative appeal, the ALJ agreed with the hearing officer that the District's IEP "demonstrates a monumental and genuine effort on the part of the District to improve [Luke's] performance in a number of areas affected by his autism." In addition, the ALJ found that Luke had achieved or was making progress towards several goals and objectives in his IEP, although regressing in other areas, but the problem was that he could not transfer his learned skills outside of the school. However, since entering BHS, Luke's self-care skills and behavior had improved. The ALJ found that the record supported the hearing officer's credibility determinations as to the various experts and the determination that only a residential placement was appropriate to ensure that Luke received more than a *de minimis* education. In particular, the ALJ noted that behavioral self-regulation skills "are access and foundational skills and academic education cannot occur if these other issues are not addressed." Because the weight of the evidence indicated that Luke could not learn these skills outside of a residential placement, the IEP developed by the District did not provide a FAPE. The ALJ noted that the Supreme Court in *Rowley* declined to accept self-sufficiency as a substantive standard under the IDEA, but nonetheless concluded that "it remains an important element in determining whether the services provided to a handicapped child are educational[ly] beneficial."

Standard of Review

The Act provides for judicial review of administrative findings and decisions. 20 U.S.C. § 1415(i)(2)(A). Pursuant to this statute, the court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(i)(2)(C). Thus, my review of this IDEA challenge is a "modified *de novo* review." *Erickson v. Albuquerque Public Schools,* 199 F.3d 1116, 1120 (10th Cir. 1999); *O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233,* 144 F.3d 692, 698 (10th Cir. 1998) (the district court must "independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence, while giving 'due weight' to the administrative proceedings below") (quotation omitted); *see also L.B., and J.B., on behalf of K.B., v. Nebo Sch. Dist.,* 379 F.3d 966, 973-74 (10th Cir. 2004) (noting that summary judgment in an IDEA case may under some circumstances be better described as a judgment on the record).

The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief, in this case Luke and Parents. *Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49 (2005).

Discussion

1. The IDEA, generally

The Act is designed to provid children with disabilities access to a free appropriate public education designed to meet their particular needs. *O'Toole*, 144 F.3d at 698. The "floor" requirements imposed by federal law consist of "access to specialized instruction and related services which are *individually designed to provide educational benefit* to the handicapped child." *Id.* (quoting *Board of Education v. Rowley*, 102 S.Ct. 3034, 3048 (1982); emphasis in quoted material). State law may provide a higher level of education for its disabled students, but it may not provide a lower level. *Id.*

A FAPE is defined by statute as "special education and related services" that are provided at public expense; meet the standards of the state educational agency; include preschool, elementary, and secondary education; and conform with an IEP. 20 U.S.C. § 1401(9). The basic mechanism for providing a FAPE is the IEP. An IEP is defined as "a written statement for each child with a disability that is developed, reviewed and revised in accordance with this section and that includes," *inter alia*, statements of: (1) the child's present levels of educational performance, (2) annual goals, and (3) the special education services and aids to be provided to the child. § 1414(d)(1)(A) (listing eight requirements for an IEP).

Upon completion of an IEP, the IEP "team" must decide placement, or the locale where the IEP will be

implemented. The statue requires that the placement be in "the least restrictive environment" to the maximum extent possible, reflecting the statute's general goal of educating children with disabilities with their typically developing peers. 20 U.S.C. § 1412(a)(5).

In 1985, the Supreme Court ruled that, if a school district defaults on its obligation to provide a FAPE, parents of a disabled child may seek reimbursement of costs and expenses incurred in unilaterally placing the child in an appropriate private facility. *School Committee of Burlington v. Dep't of Education of Massachusetts,* 105 S.Ct. 1996 (1985). In response to this holding, Congress amended the IDEA in 1997 to clarify that a school district is not required to provide education costs or services for a child placed in a private facility if the public school made a FAPE available but the parents unilaterally elected to withdraw the child from public education. Thus, the IDEA

> does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

§ 1412(a)(10)(C)(i).

Reimbursement to the parents is still required, however, if a court or hearing officer finds that the

local educational agency did not make a free appropriate public education available to the child in a timely manner prior to the child's enrollment in the private school. § 1412(a)(10)(C)(ii). This reimbursement may be limited in some instances, including if the parents did not object to the agency's proposed placement at the most recent IEP meeting prior to the removal of the child from public school, if the parents did not give timely written notice of their rejection of the proposed placement,[5] if the parents failed to make the child available for evaluation by the school district, or if a court finds the parents have acted unreasonably. § 1412(a)(10)(C)(iii).

2. District's Objections

The District raises several objections to the hearing officer's and ALJ's decisions. First, the District argues that the IEP developed by the Berthoud team in December 2003 satisfied the requirements of the IDEA because it was "reasonably calculated to provide some educational benefit." The District contends that the administrative decisionmakers erred by imposing a substantive "self-sufficiency" outcome standard, which the IDEA does not require. Second, the District argues Luke's placement at BHS does not satisfy the IDEA because it is not the least restrictive placement. Third, the District argues that

[5] The exceptions to the notice requirement are not pertinent here. § 1412(10)(C)(iv).

Parents acted unreasonably by removing Luke from the District before completion of the IEP. Fourth, the District asserts that Parents failed to provide adequate notice and are therefore not entitled to reimbursement for their unilateral placement decision. The District's final argument is that Parents failed to demonstrate that the costs of BHS are reasonable.

A. Adequacy of the IEP

The threshold issue in this case is whether the December 2003 IEP was adequate. In reviewing the adequacy of an IEP, the court first determines "whether the State complied with IDEA procedures, including whether the IEP conformed with the requirements of the Act." *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). The second step is to determine "whether the IEP was reasonably calculated to enable [the student] to receive educational benefits." *Id.* The adequacy of the IEP must be viewed from the perspective of the IEP team at the time it was written. *O'Toole*, 144 F.3d at 701 ("the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date") (quoting *Carlisle Area School v. Scott* ¶., 62 F.3d 520, 534 (3rd Cir. 1995)).

Under *O'Toole*, an IEP is a "program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the

perspective of the time it is written, the implementation of the program is an ongoing, dynamic activity, which obviously must be evaluated as such." 144 F.3d at 702 ("we do not hold that a school district can ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student").

The parties apparently do not dispute that the procedural requirements of the IDEA were satisfied. The issue, then, is whether the IEP was not reasonably designed to enable Luke to receive some educational benefits because it did not recommend a residential placement. It is well established that the IDEA does not require placement in a residential facility in order to maximize the student's potential. *O'Toole,* 144 F.3d at 708; *see also Abrahamson v. Hershman,* 701 F.2d 223, 227 (1st Cir. 1983) ("A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential"). However, the benefit conferred by the IEP must be more than *de minimis. Urban,* 89 F.3d at 727. If an IEP is reasonably calculated to confer a reasonable educational benefit and if the student makes progress toward achieving the IEP goals, the IDEA does not require more from a school district, particularly where a parent unilaterally denies the district the opportunity to modify or amend the placement or IEP. *O'Toole,* 144 F.3d at 708.

I agree with the ALJ that IEP and the placement recommended by the District in the IEP was inadequate to confer more than a *de minimis* educational benefit on Luke. I base this on the ALJ's determination, which is supported by the preponderance of the evidence, that Luke's behavioral issues were impacting his ability to derive the educational benefits in the IEP. In addition, whatever educational progress Luke made on the most fundamental life skills, such as feeding and toileting and communicating basic needs, was meaningless if there was no strategy to ensure that those skills would be transferred outside of the school environment and not lost due to regression. I agree with the District that the hearing officer's decision was in error to the extent that it imposed a substantive "self-sufficiency" standard of achievement, which is not supported by the governing case law. *See Rowley* 458 U.S. at 201 n.23 ("we cannot conclude . . . that self-sufficiency was itself the substantive standard which Congress imposed upon the States.") Nonetheless, as noted by the ALJ, self-sufficiency is an important underlying policy goal and serves to explain the importance of the areas of challenge to Luke, specifically basic life skills and behavioral self-regulation skills, which are the essential prerequisites to academic progress.

The record supports the finding of the hearing officer and ALJ that Luke's behavioral issues and eating, sleeping, and toileting problems prevented meaningful access to educational benefits. As discussed by the ALJ, the focus in determining whether

residential placement is necessary for a child with such issues is "whether the placement is required for educational purposes apart from the medical, social or emotional problems that are segregable from the learning process." *Ash v. Lake Oswego Sch. Dist. No. 7J,* 766 F. Supp. 852 (D. Or. 1991) (*citing Kruelle v. New Castle County Sch. Dist.,* 642 F.2d 687, 693 (3d Cir. 1981) and *VanderMalle v. Ambach,* 667 F. Supp. 1015 (S.D.N.Y. 1987)).

Here, Parents have shown by a preponderance of the evidence that Luke's social and emotional issues, at the time of the December 2003 IEP, were not segregable from the learning process. His dysfunctional eating and sleeping habits, which affect his behavior and long-term functioning, clearly impact his ability to get any benefit from what he learns at school. Moreover, there is significant evidence on the record demonstrating that the Luke's behavioral problems were interfering with his ability to obtain educational benefits, as it appeared the staff at his school had to spend an inordinate amount of time responding to his tantrums and resistance behavior, which were not improving. Finally, while the inability to generalize certain academic skills across environments would not always mean that an IEP is not providing an educational benefit, I must agree with the administrative decisionmakers that the lack of generalization of the most basic life skills, such as appropriate behavior, toileting, and eating indicate that the educational benefits received by Luke in December 2003 were *de minimis.* The evidence that

Luke's maladaptive behaviors were increasing, even as he made small gains in some academic areas, and that he had regressed in his communication and other important areas, further reinforce this finding.

I am also persuaded by the expert and other evidence presented indicating that, at the time, the IEP could not adequately address these needs because Luke needed a consistent regimen of behavior modification in order to establish these fundamental skills. *See S.C. v. Deptford Township Board of Ed.*, 248 F. Supp. 2d 368, 377 (D.N.J. 2003) (expert testimony that child needed 24 hour program, as well as other witness testimony showing that child's behavior at home and at school prevented academic advancement, demonstrated need for residential placement); *Ash,* 766 F. Supp. at 863 (residential placement needed so that daily living skills, such as toileting, eating, and dressing, could be taught and reinforced in a consistent manner). I note that the December 2003 IEP contained a behavior support plan, which was intended to address Luke's negative behaviors and included a recommendation to offer training to Parents to assist in providing consistency and generalizing the appropriate standards. This is a significant improvement and, as noted by the administrative officers, demonstrates the genuine good faith efforts by the Berthoud team to respond to Luke's needs. However, I credit the testimony of the expert witnesses who opined that this plan was too limited in its approach and relied too much on strategies that had been proved ineffective with Luke.

I also take note of the testimony of Dr. Dunlap, one of the District's expert witnesses, who opined that Luke's behaviors could be improved with a 24 hour consistent approach in the home and school. However, neither Dr. Dunlap nor the IEP proposed such a program or supplemental services. Moreover, the testimony of Margaret Wilson, whom the hearing officer found to be credible, is persuasive on this point. She testified that her efforts to implement just such a consistent approach between the home and school were unsuccessful despite hard work and sincere effort by the school and family. This, in combination with the numerous autism experts who testified that the nature of Luke's problems required a residential placement, persuades me that the reinforcement and consistency Luke needed to make educational progress could not be achieved in a regular school setting at that time.

B. Least restrictive environment

The District also argues that Luke's placement at BHS violates the IDEA because it is it is not the least restrictive environment ("LRE") in which he can be placed. Specifically, the District contends that the ALJ and hearing officer failed to apply the appropriate legal test for determining whether a placement is the LRE as articulated in *Nebo*. As noted by the *Nebo* court, the IDEA mandates that disabled children be educated in regular classroom to the maximum extent possible. 379 F.3d at 976. In determining whether the LRE mandate has been violated, the

court first determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and, if not, determines if the school district has mainstreamed the child to the maximum extent possible. *Id.* In considering the first prong of the test, courts may consider the following non-exhaustive list of factors: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including nonacademic benefits; and (4) the effect on the regular classroom of the disabled child's presence in the classroom. *Id.*

The hearing officer declined to apply the *Nebo* factors on the grounds that it did not apply in a case where the party seeking relief desires the more restrictive environment. The ALJ determined that in the decision, the hearing officer had in fact implicitly considered several of the *Nebo* factors, including the steps taken by the District to accommodate Luke in the regular classroom, the academic benefits Luke received in the regular classroom and those at BHS,

and accounted for the nonacademic benefits Luke received in the regular classroom.[6]

There is case law that indicates that different LRE standards apply to a parental placement than a school district placement. *Knable ex rel Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001) (parents are not required to prove that the private placement they have selected is the least restrictive environment). I agree that even if the hearing officer erred by declining to expressly make findings under *Nebo,* his decision accounted for many of the relevant factors. Moreover, the IDEA requires that disabled students be educated in the "least restrictive *appropriate* educational environment." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999) (emphasis in the original). Since the hearing officer and ALJ found that in December 2003, the BHS placement was appropriate and the Berthoud Elementary placement was not, the fact that BHS was more restrictive than Berthoud Elementary does not mean that the IDEA was violated.[7]

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[6] I note in particular the testimony of Diane Osaki, who persuasively opined that as Luke's negative behavior increased, he had to be more limited and isolated, thus reducing the likelihood he could obtain any benefit from being in a nonsegregated environment. Even the District's expert witness, Dr. Dunlap, testified that exposure to typically developing children was not an "absolute" in educating autistic children.

[7] However, this is not a static state of affairs. The record included testimony from a school administrator at BHS that one goal of the program is to make it possible for the students to be educable outside of a residential program. It appears that at

(Continued on following page)

Since no other placement options were offered, the evidence does not establish that there was a less restrictive appropriate placement for Luke at the time.

C. Reasonableness

The District also argues that Parents are not entitled to reimbursement because they acted unreasonably. *See e.g., Loren v. Atlanta Indep. Sch. Dist.*, 349 F.3d 1309 (11th Cir. 2003). In particular, the District argues that Parents' actions in failing to share the evaluations and recommendations of Margaret Wilson and Ms. Osaki with the Berthoud Elementary staff, but rather using these materials only for Luke's application to BHS, show that Parents were "gaming the system" to extract free tuition for private school. The District also points to Parents' delay in requesting a due process hearing and obtaining evidence in the interim to support the residential placement.[8] The hearing officer declined to make a finding on this issue, but the ALJ found that Parents

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some point in the future, once fundamental behavioral and life skills are sufficiently engrained and reinforced, it might be possible to educate Luke in a nonresidential public school environment, given the proper support services.

[8] The District also argues that the failure of Parents and BHS to make available certain records from BHS indicates the unreasonableness of their action. However, since this occurred post-placement, and the District has not demonstrated how these records would have changed any outcome, I do not consider this evidence to be material.

did not act in bad faith. Rather, Parents merely "took the initiative to consult with experts in the field of autism about [Luke's] deteriorating behavior and explore residential placement options prior to discussing their efforts with the District."

Although I have some concerns about Parents' failure to share important information with the District concerning Luke's educational needs and their rejection of the Berthoud Elementary placement before the IEP was finalized, the record overall demonstrates that Parents engaged in the IEP process for several years and worked with the District to implement a program that would work for Luke. Unlike the cases cited by the District, it does not appear that Parents frustrated the District's efforts to create an appropriate IEP.

Moreover, I consider relevant to this inquiry whether, even with this information, the District would have been able to create an IEP that could have addressed Luke's needs. The District's expert witness, Dr. Dunlap, opined that the consistency and training Luke needed to obtain educational benefit could be created in a day and home program, but he offered no specifics as to how this could be implemented. Moreover, I see no record evidence to show that the District had the services, experience, or ability to provide such a program or other effective alternative to the residential placement.

D. Notice

The District contends that Parents are not entitled to reimbursement because they failed to provide proper notice under the statute. Under 20 U.S.C. § 1412(a)(10(C)(iii)(1), a prerequisite to reimbursement is notice to the IEP team that the parents are rejecting the placement proposed by the public agency, including a statement of the parents' concerns and intent to enroll the child in a private school. This notice may be given at the most recent IEP meeting attended by the parents or in writing 10 days before removal of the child from the public school. *Id.* I agree with the hearing officer and the ALJ, who both determined that Parents provided adequate notice to the District by letter dated December 19, 2003.

E. Evidence of Costs

Finally, the District argues that Parents failed to demonstrate that the costs of BHS are reasonable. It appears that Parents made a written offer of proof as to the costs of BHS, but that otherwise no evidence of reasonableness was introduced. A parallel case is now pending in front of my colleague Judge Robert E. Blackburn (Case No. 05-cv-1396-REB-CBS) concerning the costs of the BHS placement. Judge Blackburn has ordered the District to pay all reasonable costs associated with Luke's education at BHS for as long as BHS is Luke's placement under the IDEA. Since Parents were required to establish their costs, and the reasonableness of such costs, in those

proceedings, any error at the administrative level in this regard is moot.

Accordingly, it is ordered:

1. Plaintiff's Motion for Summary Judgment is denied and its objections to the administrative law judge's decision are overruled.

2. Judgment shall enter against Plaintiff and in favor of Defendants, dismissing Plaintiff's complaint with prejudice.

DATED at Denver, Colorado, on June 27, 2007.

BY THE COURT:

s/ Walker D. Miller
United States District Judge

BEFORE THE OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO

CASE NO. ED 2005-0013

AGENCY DECISION UPON STATE LEVEL REVIEW

[STUDENT], by and through his parents, [PARENT] and [PARENT],

Appellees,

v.

THOMPSON R2-J SCHOOL DISTRICT

Appellants.

This is a state level review of a decision of an Impartial Hearing Officer ("IHO") issued pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, 34 C.F.R. § 330, and the Colorado Exceptional Children's Educational Act 1 CCR 301-8, §§ 2220-R-1.00 *et seq.* The Thompson School District R2-J ("District") is represented by W. Stuart Stuller, Esq. and Cheryl M. Karstadt, Esq. Jack D. Robinson, Esq. represents the Appellees.

PROCEDURAL BACKGROUND and IMPARTIAL HEARING OFFICER'S DECISION

A due process hearing was held before IHO, Joseph M. Goldhammer, Esq., on June 3, 2005, and June 7 through 9, 2005. On July 8, 2005, the IHO issued Impartial Hearing Officer's Findings and Decision ("IHO Decision"). In his July 8 Decision, the IHO found that the District's December 16, 2003 individualized education program offered to [STUDENT] did not provide [STUDENT] with a free appropriate public education as required by the IDEA and ordered the District to reimburse [STUDENT]'s parents the cost of [STUDENT]'s enrollment at the Boston Higashi School since January 12, 2004 and continuing until [STUDENT]'s placement is changed pursuant to law.

On July 21, 2005, pursuant to 20 U.S.C. §§ 1451(g) and (i) and 1 CCR 301-8, §§ 2220-R-6.03(9) and (11), the District filed a Notice of Appeal and Designation of Transcript and Record to be Considered on Appeal with the Office of Administrative Courts. Under § 2220-R-6.03(11), Administrative Law Judge ("ALJ"), Michelle A. Norcross, established a briefing schedule and scheduled oral argument. The District filed its Opening Brief on August 22, 2005. Appellees filed their Response Brief on August 26, 2005, and the District's Reply Brief was submitted on August 30, 2005.

Oral argument was held on September 9, 2005, at the Office of Administrative Courts. At that time,

the District moved to admit exhibit CC, which is approximately 400 pages of Student Logs for [STUDENT] from the Boston Higashi School. The District received exhibit CC on August 25, 2005. Appellees had no objection to the admission of exhibit CC. State level review proceedings permit the ALJ to admit additional evidence into the record (*See* § 2220-R-6.03(11)(b)(ii)). Without objection, the ALJ admitted exhibit CC into evidence.

SCOPE AND STANDARD OF REVIEW

The decision of the ALJ on state level review of the decision of the IHO is to be an "independent" one. In the context of court reviews of state level decisions under the current and prior versions of the IDEA, such independence has been construed to require that "due weight" be given to the administrative findings below, *Board of Education v. Rowley,* 458 U.S. 176, 206 (1982); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tulahoma City Schools,* 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. Factual findings based on credibility determinations "deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School v. Scott P.,* 62 F.3d 520 (3rd Cir 1995). In all other areas, non-deferential

standard is contemplated, and the ALJ exercises "plenary review." *Id.*

It is appropriate to apply this standard by analogy at the state IHO administrative review level. Thus, in this proceeding the ALJ gives "deference" to the IHO's findings of fact and accords the IHO's decision "due weight", while reaching an independent decision based on a preponderance of the evidence. *Sioux Falls School District v. Koupal,* 526 N.W.2d 248 (S.D. 1994).

ISSUE ON REVIEW

Whether the IHO erred in ordering the District to reimburse [STUDENT]'s parents for their unilateral placement of [STUDENT] at the Boston Higashi School.

FINDINGS OF FACT

Based on the evidentiary record, the ALJ enters the following Findings of Fact, giving due deference to the findings of the IHO:

1. [STUDENT] was born on August 29, 1994. He has two older brothers and a younger sister, all of whom live at home. [STUDENT] lived at home with his parents until he was enrolled in residential placement at the Boston Higashi School ("Boston Higashi") in January of 2004.

2. In 1996, Dr. Sally J. Rogers of the JFK Center for Developmental Disabilities, University of Colorado Health Sciences Center, diagnosed [STUDENT] with autism. Autism or autism spectrum disorder is a behavioral syndrome that typically impairs communication skills and social development. Individuals with autism often manifest stereotypical or perseverative behaviors, such as avoiding eye contact and not responding to verbal or social cues. [STUDENT]'s autism evinces all of these characteristics. In [STUDENT]'s case, his autism also appears with mental retardation. His speaking vocabulary includes approximately 75 words in school; he speaks many fewer words at home. His social interactions are significantly delayed and his academic performance reflects his cognitive impairments.

3. In addition to his cognitive impairments and diminished communication and social skills, [STUDENT]'s case presents severe self-care issues, particularly in the areas of eating, sleeping, dressing, and toilet training. He frequently displays inappropriate behaviors in the form of throwing tantrums, screaming, throwing objects, and dropping to the floor, all to escape unwanted activities or situations or sensory difficulties.

4. One of [STUDENT]'s biggest challenges is learning how to generalize skills. Generalization is the ability to take a skill and move it across environments and across time and not have to be re-taught that skill; the skill exists on its own. For example, if [STUDENT] learns how to tie his shoes in school, he

is said to have generalized that skill by demonstrating the ability to tie his shoes at home or in any other venue at a later time. Typically, developing students generalize what they have learned, and students with developmental disabilities such as autism have great or greater difficulty with generalization. In [STUDENT]'s case, he could not transfer a skill unless he was interacting directly with the person who taught him the skill.

5. [STUDENT]'s autism further inhibits him from retaining knowledge and skills that he has learned unless they are reinforced through constant repetition. This pattern is referred to as regression. Several of [STUDENT]'s teachers noted that [STUDENT] lost some of the progress he made over each weekend due to regression, and that part of the time on Mondays was spent compensating for that regression.

6. In the fall of 2000, [STUDENT] entered kindergarten in the St. Vrain Valley School District at Niwot Elementary School. Special Education teacher Margaret Wilson was [STUDENT]'s primary teacher. Margaret Wilson had worked with [STUDENT] in his pre-school setting prior to his entering kindergarten.

7. [STUDENT]'s kindergarten individualized education program ("IEP"), dated February 13, 2001, included one half hour per week of special education services in the classroom, two hours per week in the special education classroom, .75 hours per week of

speech and language therapy, and one half hour per week of occupational therapy.

8. The February 2001 IEP included goals and objectives for communication skills, self-care (toilet training and dressing), independence and motor skills, social interaction and play skills, and academic functioning. It also provided for extended school year services ("ESY") during the summer months to address [STUDENT]'s strong proclivity for regression.

9. [STUDENT]'s kindergarten Vineland Adaptive Behavior Scales test results reveal significant discrepancies in [STUDENT]'s functioning between school and home, confirming [STUDENT]'s serious problems with generalization of skills.

10. Margaret Wilson remained [STUDENT]'s special education teacher through first grade at Niwot Elementary School. [STUDENT] was in the special education classroom during most of his first grade year. His annual first grade IEP, dated January 15, 2002, included self-care skills in the areas of washing and dressing only; he had become toilet trained at school during his first grade year.

11. In the fall of 2002, [STUDENT] transferred to Berthoud Elementary School in the Thompson School District as a second grade student. In anticipation of the transfer, Dee Ann Wilson, the special education teacher at Berthoud, visited Niwot and worked with Margaret Wilson and [STUDENT]'s parents to facilitate a smooth transition to the new school. The initial IEP at Niwot, dated December 19,

2002, provided for education outside the general classroom for more than 60% of the day. It also provided for adaptive physical education, occupational therapy, speech and language therapy, and some time in the general classroom for mainstreaming and interaction with non-disabled students during administrative activities.

12. The December 2002 IEP included self-care goals and objectives for washing and feeding. The previous goals and objectives for toilet training and dressing were elimination because [STUDENT] had achieved theses goal, at least in the school setting. A subsequent IEP, dated April 17, 2003, developed during the spring of [STUDENT]'s second grade year at Berthoud, repeats the same self-care goals and objectives as those in the December 19, 2002 IEP.

13. During kindergarten and through his second grade year at Berthoud, [STUDENT] made progress with his special education and was meeting many of the goals and objectives in his IEPs. However, he was unable to take the skills he was learning at school and transfer them to his home and community life. [STUDENT]'s home and community behavior was in stark contrast to his behavior at school.

14. Prior to entering kindergarten, [STUDENT] developed sleep problems. He would fall asleep at odd hours and wake up in the middle of the night to play videos or wander through the house. [STUDENT] refused to sleep in a bed. Instead, he curled up on the floor with covers to sleep.

15. Although [STUDENT] had become toilet trained at school during his first grade year, he was unable to transfer this skill to his home life. [STUDENT]'s nighttime hygiene skills were severely lacking. Beginning when he was four years old, [STUDENT] developed the habit of spreading nighttime bowel movements around his bedroom, on the carpet, bedding, walls, and curtains. His parents could not keep his room clean and sanitized without permanently removing the curtains and replacing the carpeting with vinyl. Additionally, at night [STUDENT] was fitted with nylon jump suits that zipped up from the back, restricting him access to his feces. However, this did not completely deter him from continuing to engage in these behaviors.

16. Each night [STUDENT]'s parents administered a suppository to induce a bowel movement before bed, to reduce the likelihood of one occurring during the night, which they had done since he was 4 years old. At the time [STUDENT] was enrolled at Boston Higashi, he was incontinent of bladder and bowel outside of school both during the day and night, even though he was fully toilet trained at school.

17. [STUDENT] was also a very picky eater and, prior to his enrollment at Boston Higashi, ate only yogurt, crackers and croutons. When he was presented with other food, such as fruits, vegetables and meat, [STUDENT] had temper tantrums, kicked, screamed and often threw the food onto the floor. When the family would go out to eat at a restaurant,

[STUDENT] would often wander off and take food from other customer's plates.

18. In grocery stores, [STUDENT] would try and pull down the food displays and vociferously object when he was prohibited from doing so. [STUDENT]'s parents were also unable to control [STUDENT]'s inappropriate behaviors at church. After a while, the family stopped taking [STUDENT] on public outings, to church or out to dinner. As [STUDENT]'s behavioral problems increased, his parents were forced to rely more and more on [STUDENT]'s grandparents for help and a hired attendant to watch [STUDENT] while they attended to other familial responsibilities.

19. As he got older and physically larger, [STUDENT]'s tantrums became more troubling to his family. On one occasion, [STUDENT] made a threatening gesture towards his sister. And on occasion at home, but never at school, [STUDENT] directed his anger and frustration toward his mother; he tried to kick and bite her. At school, when [STUDENT] became angry or frustrated he demonstrated it by throwing objects to the floor, screaming, dropping to the floor and flailing about in an undirected fashion. There is no evidence that [STUDENT] directed his anger or frustration toward a teacher or student at Niwot Elementary or Berthoud Elementary.

20. In an attempt to control [STUDENT]'s behavioral problems, his parents took him to a psychiatrist, who prescribed sedatives. However, the

medication was ineffective unless prescribed in such high doses that it rendered [STUDENT] passive and unresponsive. [STUDENT] was taken off the medication.

21. By the summer of 2003, [STUDENT]'s parents became so concerned about [STUDENT]'s behavioral problems that they contacted social services to inquire about residential placement programs. They discovered that in order for social services to place [STUDENT] in a residential facility, they would have to relinquish custody of [STUDENT] to the county department. Understandably, the family did not want to do that. [STUDENT]'s father decided to search the Internet for alternative residential placement options and discovered Boston Higashi, which has both a day student program and a twenty-four hour placement program.

22. [STUDENT], his parents, and Margaret Wilson visited Boston Higashi in late October, early November 2003. During their visit, [STUDENT]'s parents filled out an application to enroll [STUDENT] in the school's residential placement program. On the application, they stated that [STUDENT] needed partial assistance with dressing and eating and total assistance with toilet training, washing and sleeping. The parents specified "communication; toilet training; sleeping; ADL" (activities of daily living) as the areas of greatest difficulty. When asked why [STUDENT] needs to change schools, they responded: "Adolescence is approaching. [STUDENT] needs to learn routines for independence, [STUDENT] thrives on

structure and needs to maximize pro-active routines. We need to provide [STUDENT] an environment where he can maximize his potential." The parents did not inform the district about their visit to Boston Higashi until December 2003.

23. The parents' decision to enroll [STUDENT] at Boston Higashi was done primarily because they were concerned about [STUDENT]'s dysfunctional behaviors away from school and his increasing inability to regulate himself and care for his needs at home and in public. However, since his behaviors away from school appeared to be deteriorating, the parents also decided to inquire further about [STUDENT]'s behaviors at school. They asked Diane Osaki, an occupational therapist who had opened a private day school for children with autism, and Margaret Wilson to observe and assess [STUDENT] in scholastic settings.

24. In December 2003, Diane Osaki observed [STUDENT] at Berthoud Elementary for a three-hour period in the morning, conducted a parent interview, reviewed charts and a video of [STUDENT] Following her assessment, she prepared a report. Diane Osaki's opinions as expressed in her report and at hearing are consistent with the overall record and the findings made by the IHO. [STUDENT] was functioning at a higher level at school than at home and remained unable to transfer skills he learned at school to his home and community environments.

25. Margaret Wilson met with [STUDENT] on November 28, 2003, and administered the Autism Diagnostic Observation Schedule test. Based on her observations of [STUDENT] before and during the testing, she concluded that [STUDENT] had regressed in his previously attained skills, but began to demonstrate some previously learned skills after spending some time with her. Margaret Wilson's observation that [STUDENT] showed regression in his previously attained skills when she first started working with him on November 28 is not in and of itself conclusive evidence that [STUDENT] had lost some of his academic achievements. [STUDENT] had not worked with Margaret Wilson in a school setting since July 2002, had not been in her classroom for 15 months, and was very agitated when he first met with her on the day of the test. The ALJ finds [STUDENT]'s initial inability to demonstrate previously learned skills on November 28 evidence of his inability to generalize, not necessarily conclusive proof that he had lost skills he had previously learned when Margaret Wilson was his teacher.

26. On December 16, 2003, the parents and representatives for the District, including Dee Ann Wilson, [STUDENT]'s then current special education teacher, met for the triennial IEP meeting. At the meeting, [STUDENT]'s father presented a list of written goals for [STUDENT] that the parents wanted included in the 2003 IEP. He also disclosed for the first time that he did not think these goals were attainable in [STUDENT]'s present environment and

that [STUDENT] needed to be placed in a residential program. The parents informed the District that they were looking at sending [STUDENT] to Boston Higashi because it was a more appropriate placement. The District requested an opportunity to revise the draft IEP it brought to the December 16 meeting to consider the parents' requested goals.

27. On December 18, 2003, Boston Higashi accepted [STUDENT] in its residential placement program. The following day, December 19, 2003, [STUDENT]'s parents, through their counsel, sent a letter to the District advising the District that the IEP was rejected and that [STUDENT] was being removed from the District and being enrolled in a private school. The parents also stated that they would be seeking reimbursement of all related costs from the District.

28. [STUDENT] enrolled as a residential student at Boston Higashi on January 12, 2004. Boston Higashi has both residential and day students, all of whom have a diagnosis of autism. It is housed on a campus-type property with the residential facility in close proximity to the classroom and physical education building. At Boston Higashi, [STUDENT] is supervised 24 hours per day, seven days per week, for 44 weeks each year. The remaining 8 weeks, [STUDENT] comes back to live with his family in Colorado. The 8 weeks at home are divided up into several breaks interspersed throughout the calendar year.

29. On January 15, 2004, the District completed the final version of the December 16, 2003 IEP incorporating the additional goals and objectives requested by the parents relating to [STUDENT]'s use of the bathroom, eating, dressing and information regarding [STUDENT]'s proficiency in various areas. The one item that remained unchanged from the December 16 draft was the placement recommendation. The District's 2003 IEP included continued placement at Berthoud Elementary with direct instruction in the special education classroom for 18 ½ hours per week and indirect support in the general classroom for 12 hours per week, occupational therapy for ½ hour per week and speech/language therapy for 1 hour per week.

30. There is little disagreement between the parties that the goals and objectives contained in the District's December 2003 IEP address the substantive aspects of [STUDENT]'s autism and cognitive impairments. The goals and objectives specifically relate to ways of improving [STUDENT]'s motor skills, communication skills, self-care skills, social interaction skills, reading and writing skills, behavioral management skills, and [STUDENT]'s overall ability to become increasingly independent in all areas. The December 2003 IEP incorporates the majority of parents' list of written goals that were presented at the December 16 meeting.

31. The IHO found, and the ALJ adopts as fact, that the District's December 2003 IEP demonstrates a monumental and genuine effort on the part of the

District to improve [STUDENT]'s performance in a number of areas affected by his autism. Furthermore, the District's IEP attempts to achieve these goals in a somewhat integrated milieu by maintaining some interaction between [STUDENT] and his non-disabled peers.

32. The evidence shows that while [STUDENT] was attending Berthoud Elementary School he had achieved nearly a quarter of the goals and objectives in his IEP and that he was making slow by steady progress toward others. In certain areas he continued to demonstrate regression, even at school, but overall [STUDENT] was advancing in his goals at school. The problem remained, however, that despite his progress at school, [STUDENT] was unable to transfer any of his learned skills and use them in environments outside of school. When [STUDENT] entered Boston Higashi, he was incontinent outside of school, was not sleeping through the night, ate only a limited diet, and was frequently displaying inappropriate behaviors in the form of screaming and throwing tantrums in degrees of severity to escape unwanted activities or situations.

33. Since entering Boston Higashi, [STUDENT]'s self care skills and behaviors have improved. He no longer sleeps in a nylon suit on the floor. He now sleeps in a bed in his own room and at school. When he comes home on breaks from school, his toilet training has improved. He still has some accidents at night, but is toilet trained during the day. He is eating a variety of healthy foods and

during his last visit home, the frequency and intensity of his adverse and resistive behaviors had mitigated.

34. At the due process hearing both sides presented a number of expert witnesses. All the experts presented have impressive credentials and significant experience in dealing with children with autism in clinical, academic, and educational settings. The experts in this case agree that children with autism, while manifesting some similar behaviors, are individual in their reaction and response to their environment. Some children with autism manifest more severe behaviors than [STUDENT] and some less severe. [STUDENT] falls somewhere between moderate and severe on the autism spectrum. And there is little dispute that [STUDENT] has great difficulty generalizing.

35. The District presented the expert testimony of Drs. Phillip Strain and Glen Dunlap. Both these experts rendered their opinions based on a review of records supplied by the District and after viewing several videos taken of [STUDENT] at Berthoud Elementary and Boston Higashi. Neither expert personally interacted with [STUDENT], his parents, or his educational providers. Prior to the hearing, neither Drs. Strain nor Dunlap knew about [STUDENT]'s sleeping, eating and incontinence problems before he left Berthoud Elementary.

36. Both Drs. Strain and Dunlap concluded that the December 2003 IEP proposed by the District

would provide an appropriate education to [STUDENT] Dr. Strain opined that the District's IEP would provide an appropriate education to [STUDENT] because its implementation would be, at least in part, in the presence of typically developing peers and because it included fairly intensive data collection. According to Dr. Strain, research suggests that students with autism demonstrate more problem behaviors when their social contacts are confined to others with the same syndrome. Boston Higashi has only students with the diagnosis of autism. Dr. Dunlap agreed with the opinions of Dr. Strain but admitted that [STUDENT]'s behavioral problems represent an impediment to his participation and his quality of life and education. Neither Drs. Strain nor Dunlap offered an opinion as to a specific or structured solution the District could adopt to address [STUDENT]'s problems generalizing his learned skills to home and the community.

37. Experts Margaret Wilson, Diane Osaki, Rosemary Littlefield (Executive Director of Boston Higashi), Dr. Ann Roberts Ph.D. (clinical psychologist and on staff at Boston Higashi), and Ellen Hanson Ph.D. (psychologist at Children's Hospital in Boston) testified on behalf of [STUDENT] All these experts opined that residential placement is an appropriate placement for [STUDENT] based on his documented progress in the progam and his need for that type of setting to overcome his obstacles to lead a meaningful and quality life.

38. Based upon the totality of the circumstances, the IHO credited the lay and expert testimony of Margaret Wilson, Rosemary Littlefield and Ann Roberts over the expert testimony of Drs. Strain and Dunlap on the basis that the former witnesses demonstrated familiarity with the individual behaviors of [STUDENT] in his school and residential settings, and provided understandable, specific, structured and planned solutions to the chief problems that threaten [STUDENT]'s integration into society in a meaningful way when he graduates form school and that his educators must confront to provide him with some educational benefit. The ALJ finds the record supportive of the IHO's credibility assessment of these witnesses and adopts the IHO's findings in this regard. In particular, the ALJ finds the testimony of witness Margaret Wilson persuasive and compelling on the issue of why [STUDENT] requires residential placement to achieve his academic goals and receive more than a de minimums education.

39. After her assessment in November 2003, Margaret Wilson found that [STUDENT] remained unable to generalize learned skills. Margaret Wilson concluded, and the ALJ finds a fact, that [STUDENT]'s inability to generalize learned skills dictates the need for residential placement. It is the through persistent guidance and training available only through a residential placement that will deeply ingrain [STUDENT] with proper behaviors so that they become his default behaviors across environments. In terms of

educating children, behavioral self-regulation (i.e., learning skills that will allow a child to regulate to his environment, to the people around them, to sensory input, and to emotional input) is paramount to education. Behavioral self-regulation skills are access and foundational skills and academic education cannot occur if these other issues are not addressed. Even the District's expert, Dr. Dunlap opined that [STUDENT]'s challenging behaviors represent an impediment to his education and that without generalized responding, the child, the teachers, and the administrators are not getting much of a return on their educational investment.

40. The record further establishes that Margaret Wilson's recommendation for residential placement for [STUDENT] did not come lightly. Margaret Wilson holds a strong philosophical belief, as do most of the experts that testified in this case, that children, such as [STUDENT], belong in neighborhood schools and that families have a right to be part of the school community and the school community has the right to be part of the family. In this case, however, [STUDENT]'s struggles with generalization coupled with his difficulty to self-modulate and self-regulate, dictate his need for a 24-hour seamless educational environment seven days a week. [STUDENT] requires such an environment to truly learn new skills, master and generalize them.

41. Based on the totality of the circumstances, including Margaret Wilson's extensive experience in teaching [STUDENT] and other children with autism,

her high degree of competence in that area, and her demeanor on the witness stand, the IHO found Margaret Wilson's testimony credible and persuasive. The ALJ is further persuaded by Margaret Wilson's testimony and also finds her a credible witness. The District's experts, though highly qualified, lack the extensive experience in teaching [STUDENT] and were not familiar with his baseline level of functioning prior to entering Boston Higashi. To that extent, their opinions are not as persuasive as those given by Margaret Wilson.

42. The IHO found, and the ALJ adopts as fact, that the professionals on the staff of the District who testified in this matter are competent and diligent and that [STUDENT] needs residential placement because of the unique character of his disability, not due to any shortcomings on their part.

43. The failing of the December 2003 IEP is not in the goals and objectives. The problem is that the goals and objectives are not attainable in the placement recommended by the District at Berthoud Elementary. In order to receive a free appropriate education, at this time, [STUDENT] requires a 24-hour-per-day, year-round education.

44. The evidence in this case provides no coherent method for [STUDENT] to surmount the difficulties posed by his severe inability to generalize his learning and to retain it without regression other than a residential placement, such as the one he is in at Boston Higashi.

45. The ALJ agrees with the finding of the IHO that the December 16, 2003 IEP did not offer [STUDENT] a free appropriate public education because it did not include a recommendation for residential placement.

DISCUSSION

Structure and Purpose of the IDEA

The IDEA, formerly known as the Education for All Handicapped Children Act, provides federal money to state and local agencies for the education of children with disabilities to ensure they are given:

> [A] free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to education handicapped children.

20 U.S.C. § 1400(c).

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require that agency to reimburse the parents for the cost of that

> enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii).

The statute's primary purpose of providing a free appropriate public education ("FAPE") is achieved through the development of an IEP, tailored for each child with a disability. 20 U.S.C. § 1401(a)(18)(D). In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". *Id.* at 186. That decision held that the statutory definition of FAPE requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Rowley* at 201. It also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley* at 196.

Individual Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined

at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

> (A) a statement of the present levels of educational performance of such child;
>
> (B) a statement of annual goals, including short-term instructional objectives;
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;
>
> (D) the projected date for initiation and anticipated duration of such services; and
>
> (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

As correctly stated by the IHO, "[a]ny analysis regarding whether the December 16, 2003 IEP offers [STUDENT] a FAPE must begin with the proposition that the school district's obligation to [STUDENT] extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit to him." (IHO Decision, page 17, citing *Rowley*.) In answering this

question, the IHO concluded, "[u]ltimately, unless [STUDENT] improves these basic skills [verbal communication, toilet training, eating, dressing and self regulation of his behaviors] and retains them, he will not achieve any of the self-sufficiency gains relied upon in *Rowley* and the legislative record to which it refers, which determine whether the IEP is reasonably calculated to confer some educational benefit." (IHO Decision, page 22.) The District argues that the IHO's reliance on *Rowley* is misplaced and that the IHO mischaracterizes the standard *Rowley* imposed on the States. As argued by the District, in *Rowley,* the Supreme Court expressly stated, "We cannot agree . . . that self-sufficiency was itself the substantive standard which Congress imposed upon the States." *Rowley,* 458 U.S. at 201, n. 23.

In analyzing the meaning of the phrase "free appropriate education", the *Rowley* Court concluded, as the District points out, that self-sufficiency itself was not the substantive standard imposed by Congress on the states. The Court declined to adopt the "self-sufficiency" test for the following reason:

> Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children

> be educationally beneficial, whatever the nature or severity of their handicap.

Id.

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.

Rowley at 201-202.

The District is correct that the Supreme Court, in *Rowley,* declined to accept self-sufficiency as the substantive standard. However, the Court limited its holding in *Rowley* specifically to the facts before it, which involved a hearing-impaired child advancing from grade to grade, and who was performing above average in the regular classroom of a public school system. *Rowley* at 202. Interpreting the Court's ruling in *Rowley,* the Third Circuit held, "we observe, as did the majority in *Rowley,* that a key concern of and primary justification for the [IDEA] lay in the important goal of fostering self-sufficiency in handicapped children." *Polk v. Ctl. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 181 (3rd Cir. 1988). The chief sponsors of the act stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for

handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. *Id.* Based upon a careful reading of *Rowley* and taking guidance from the Third Circuit's decision in *Polk,* the ALJ concludes that although self-sufficient is not the substantive standard of the act, it remains an important element in determining whether the services provided to a handicapped child are educational beneficial.

In its Opening Brief, the District posits the threshold question of the case as: To what extent does the IDEA make school districts responsible for rectifying the behaviors of children at home and in the community? The ALJ finds that the threshold question in this case is whether the District's December 2003 IEP is sufficient to confer some educational benefit upon [STUDENT], not whether the District is responsible for rectifying [STUDENT]'s behaviors at home and in the community. In answering this question, one must look first at the December 2003 IEP.

The IHO found that the December 2003 IEP, on its face, addresses the substantive aspects of [STUDENT]'s autism, his social and communicative problems and his mental retardation. The IHO also found that the December 2003 IEP constitutes a monumental and genuine effort on the part of the District to improve [STUDENT]'s performance in a number of areas. The ALJ agrees with the IHO on both points. However, despite the laudable attempts of the District and [STUDENT]'s parents to improve [STUDENT]'s deficits, the fact remains that [STUDENT]'s

behavioral problems were impacting his ability to derive many of the educational benefits in his IEP. The fundamental problem with the December 2003 IEP lies with the recommended placement, not the goals and objectives. Further, the December 2003 IEP does not adopt a specific strategy or plan to enhance the possibility or probability that [STUDENT] will be able to avoid regression and to generalize what he learns so that he might achieve some benefit from all the education offered to him.

[STUDENT] met nearly a quarter of the goals and objectives in the IEP and was making slow but steady progress toward others. Yet, he remained consistently unable to transfer his learned skills to other environments and this inability to generalize prevented him from performing the most basic of human tasks, including eating, sleeping, dressing and toileting. As stated best by the IHO, "[t]he skills involved are not embellishments and frills. They are the most basic ingredients to successful social functioning . . . " (IHO Decision, page 20). Even Dr. Dunlap agreed that [STUDENT]'s challenging behaviors represent an impediment to his education and that without generalized responding, the child, the teachers, and the administrators are not getting much of a return on their educational efforts.

For children, like [STUDENT], with severe emotional disturbances education begins with basic self help and social skills, including toilet training, dressing, eating, and communication. *See, Polk*, supra, citing *Battle v. Pennsylvania*, 629 F.2d 269,

275 (3rd Cir. 1980). In discussing children with severe emotional disturbances:

> Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social, and arithmetic skills, such as counting, making change and identifying simple words.

Battle, at 275.

Several courts have concluded that residential placement is necessary to provide a severely autistic child with an appropriate education. *Ash v. Lake Oswego School Dist.,* 766 F.Supp. 852, 862 (D.Or. 1991), *aff'd* 980 F.2d 585 (9th Cir. 1992) (citing *Stacey G. v. Pasadena Indep. School Dist.,* 695 F.2d 949 (5th Cir. 1983)); *Drew P. v. Clarke County School Dist.,* 676 F.Supp. 1559 (M.D. Ga. 1987). The focus in determining whether residential placement is necessary must be on whether the placement is required for educational purposes apart from the medical, social or emotional problems that are segregable from the learning process. *Ash,* at 862 (citing *Kruele v. New Castle County School Dist.,* 642 F.2d 687, 693 (3rd Cir. 1981)).

In *Ash,* the court recognized that a residential placement is necessary for an autistic child when the child's learning needs require the consistency and

continuity that only a 24-hour-a-day environment can provide. *Ash* at 859. In support of its finding that residential placement for Christopher Ash was appropriate, the court held:

> An appropriate education for Christopher is an education which will make it possible for him to be successful outside of a classroom setting. The evidence in this case shows that an appropriate education for Christopher is one that only a twenty-four-hour-a-day, seven-day-a-week educational environment can provide. While residential placement for a handicapped child is only appropriate in very limited circumstances, Christopher's medical, social and emotional problems are so severe that they are not segregable from his learning process, and therefore residential placement is required for educational purposes. Daily living skills, such as toileting, eating and dressing, can only be taught to him and reinforced for him in the consistency of a residential setting.

Id. at 863.

In the instant case, the evidence establishes that [STUDENT]'s social and behavioral problems significantly interfere with his learning process. As Margaret Wilson credibly and persuasively testified, [STUDENT]'s inability to generalize learned skills dictates the need for residential placement. It is the through persistent guidance and training available only through a residential placement that will deeply ingrain [STUDENT] with proper behaviors so that

they become his default behaviors across environments. Behavioral self-regulation is paramount to education; these skills are access and foundational skills and academic education cannot occur if these other issues are not addressed. The IHO concluded, "These skills are most often practiced outside of the educational environment and it is not enough that [STUDENT] learned to do them only in school." (IHO Decision, page 19). The ALJ agrees.

The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley,* 458 U.S. at 206-7. The IDEA is designed to provide a floor not a ceiling. However, the "basic floor of opportunity" provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Id.* at 201. Without a specific strategy or plan to enhance the possibility or probability that [STUDENT] will be able to avoid regression and to generalize what he learns so that he might achieve some benefit from all the education offered to him, the December 2003 IEP cannot and does not meet the requirements of the IDEA.

Least Restrictive Environment

In addition to providing personalized instruction for a handicapped child, a state must comply with the IDEA's requirement that this personalized instruction be provided in the least restrictive environment ("LRE"). In order to do so, a state must adopt:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, the LRE means, "an environment in which a child with disabilities is educated with children who do not have disabilities, unless: the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, or when provided with supplementary aids and services, the nature or severity of the disability is so disruptive that the education of other children in such classes would be significantly impaired." 1 CCR § 301-8, 2220-R-5.02.

In *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004), the parents of K.B., a child diagnosed with autism, unilaterally removed K.B. from the Nebo School District and placed her at their own expense in a private preschool. Although K.B.'s parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place K.B. at Park View. Park View is a special education preschool populated primarily by disabled students, but includes thirty to fifty percent typically developing children who interact throughout the school day with the disabled children. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that K.B. was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not K.B.'s least restrictive environment. *Id.* at 975.

In its decision in *Nebo,* the court held:

> In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A) . . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F3d 921, 926 (10th Cir.

> 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

In determining whether the LRE mandate in the IDEA has been violated by the school district, the Tenth Circuit applied the two-part *Daniel R.R.* test *(See, Daniel R.R. v. Bd. Of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)) in which the court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Nebo*, 379 F.3d 966, 976. In determining the first prong of the *Daniel R.R.* test the court may consider the following non-exhaustive factors:

> (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect of the regular classroom of the disabled child's presence in that classroom.

Nebo at 976 (citing *Murray*, 51 F.3d at 926 n. 10).

In this case, the District argues that the IHO erred by refusing to apply the *Daniel R.R.* test in determining whether [STUDENT]'s placement complies with the LRE requirement. According to the District, the IHO "applied a self-created balancing test, determining whether Boston Higashi was superior to Berthoud Elementary, ignoring that a court may not substitute its notion of sound educational policy for those of school authorities . . . " (District's Opening Brief, page 29). The ALJ disagrees that the IHO adopted his own balancing test to determine compliance with the LRE standard. In determining that [STUDENT] requires residential placement, the IHO took into consideration several of the non-exhaustive factors set out in *Daniel R.R.* Specifically, the IHO considered the steps the District took to accommodate [STUDENT]. He also compared the academic benefits [STUDENT] received in the regular classroom with those he is receiving at Boston Higashi, and accounted for the non-academic benefits [STUDENT] received in a regular classroom (IHO Decision, pages 19, 20 and 21). The ALJ concludes that the IHO's determination that Boston Higashi is the least restrictive environment is supported by the evidence.

In upholding the IHO's determination, the ALJ is mindful that the experts in this case agreed that, typically, disabled children benefit from remaining a part of their community and interacting with their non-disabled peers. However, in this case, despite [STUDENT]'s continual interaction with non-disabled

peers and members of the community, he had not generalized essential and basic skills as late as 2003, and he has done better since entering Boston Higashi. Applying the factors of the *Daniel R.R.* test, the ALJ concludes that, given the nature and severity of [STUDENT]'s disabilities, Boston Higashi is the least restrictive environment.

Reimbursement

The District argues that [STUDENT]'s parents are not entitled to reimbursement for the unilateral placement because the parents acted unreasonably. In support of this argument the District cites several cases where reimbursement was denied because it was determined that the parent's "gamed the system to extract free tuition for a private school." In this case, the District asserts, "[a] review of the time line here demonstrates a deliberate and elaborate effort to game the system." (District Opening Brief, page 35). The record does not support this allegation. It is abundantly clear that all persons involved in [STUDENT]'s life, including his teachers and parents, undertook monumental efforts to ensure [STUDENT]'s educational success. The fact that [STUDENT]'s parents took the initiative to consult with experts in the field of autism about [STUDENT]'s deteriorating behavior and explore residential placement options prior to discussing their efforts with the District is not evidence of gaming the system. The parents took these steps because they were genuinely

concerned about [STUDENT]'s declining behavior and the impact it was having on him and their family.

The District also argues that notice was insufficient to support a claim of reimbursement. As found by the IHO, and adopted by the ALJ, [STUDENT]'s parents, through counsel, provided written notice to the District on December 19, 2003, that the District's December 2003 IEP was rejected. The District did not finalize and send the December 16, 2003 IEP to the parents until January 15, 2004, three days after [STUDENT] started school at Boston Higashi. The District claims that under the IDEA the parents must give the District ten days notice that they were rejecting the IEP and enrolling their child in a private school at public expense. *See,* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). And because they did not provide notice after the IEP was finalized that the IEP was rejected, notice is insufficient. This argument was raised at the due process hearing and rejected by the IHO. The IHO concluded, and the ALJ agrees, that 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) mandates that the parents give the ten day notice prior to the removal of the child from the public school, regardless of when the school district finalizes the IEP. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) instructs the parents to give appropriate notice of the rejection of the "placement **proposed** by the public agency." (emphasis added.) The District proposed placement at Berthoud Elementary on December 16, 2003. Accordingly, the December 19, 2003 letter complies with the notice requirements of the statute.

Remedy

The District contends that the remedy ordered by the IHO is inappropriate because [STUDENT]'s parents failed to produce evidence regarding the specific costs for which they seek reimbursement. Following the due process hearing, through written offer of proof sent to the IHO on June 14, 2005, [STUDENT]'s father submitted dollar amounts regarding the tuition and transportation costs associated with [STUDENT]'s placement at Boston Higashi. The District stipulated that the offer of proof represented [STUDENT]'s father's testimony, but did not stipulate to the factual accuracy of the testimony or waive the arguments made in its motion to dismiss, which asserted that [STUDENT]'s parents failed to satisfy the burden of proof on the costs of reimbursement. In his Decision, the IHO states, "[t]he IHO agrees that the offer of proof does not contain sufficient detail upon which to base an order requiring the [District] to pay to [[STUDENT]'s parents] a sum certain . . . Therefore, the IHO will enter a general order requiring the [District] to reimburse the costs of enrollment at the Boston Higashi School since January 12, 2004. The parties should then attempt to reach agreement on those costs. The remedies available to the parties if they fail to reach agreement on costs are beyond the scope of this Decision." (IHO Decision, page 25 and 26).

As noted by the IHO, this is not the first case where the parents seeking tuition reimbursement did not offer specific evidence regarding costs prior to

determining their right to reimbursement. In *Ash,* 766 F.Supp 852, the plaintiffs of a child enrolled at Boston Higashi offered no evidence of specific costs in their case-in-chief. After finding a right to reimbursement, the Court ordered the parties to "submit supplemental memoranda addressing the issue of the specific amount of reimbursement appropriate unless they can reach an agreement on the amount of reimbursement." *Ash* at 865. Similarly, in *Denver Public Schools,* Case No. ED 2000-25, pp. 12-13 and *Thompson R-2J School District,* Case No. L2001:123, the ALJ and IHO ordered the parents to submit all their reimbursable costs to the District and/or IHO for review following the decision addressing a claim for reimbursement. The ALJ upholds the IHO's general order requiring the District to reimburse the costs of [STUDENT]'s enrollment at Boston Higashi since January 12, 2004 and further orders the parents, within 20 days of this decision, to document to the District all of their reimbursable costs related to [STUDENT]'s placement at Boston Higashi from January 12, 2004 through the date of this decision.

CONCLUSIONS OF LAW

1. The District's December 16 2003 IEP did not offer [STUDENT] a free appropriate public education as required by the IDEA.

2. Residential placement at Boston Higashi School is the least restrictive environment for [STUDENT]

3. The parent's December 19, 2003 letter to the District provided adequate notice under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) to support a claim for reimbursement.

4 Appellees have met their burden of establishing a claim for reimbursement of the costs of [STUDENT]'s enrollment at Boston Higashi since January 12, 2004. Within 20 days of the date of this decision, [STUDENT]'s parents must submit to the District any and all documents related to their reimbursable costs incurred by the placement of [STUDENT] at Boston Higashi from January 12, 2004 through the date of this decision.

DECISION

Based on the foregoing, the ALJ affirms the July 8, 2005 decision of IHO. The District shall reimburse [STUDENT]'s parents the cost of [STUDENT]'s enrollment at the Boston Higashi School since January 12, 2004, and continuing until his placement is changed pursuant to law. Within 20 days of the date of this decision, [STUDENT]'s parents must submit to the District any and all documents related to their reimbursable costs incurred by the placement of [STUDENT] at Boston Higashi from January 12, 2004 through the date of this decision.

This Decision Upon State Level Review is the final decision on state level review except that any party has the right to bring a civil action in an appropriate court of law, either federal or state.

DATED AND SIGNED
October 6, 2005

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on October ___, 2005, I sent a true and correct copy of the **AGENCY DECISION UPON STATE LEVEL REVIEW** by first class mail, postage prepaid to the following:

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COLORADO DEPARTMENT OF EDUCATION

SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2005: 102

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

In the matter of:

[STUDENT], by and through his Parents, [PARENT] and [PARENT]

Petitioner,

v.

THOMPSON SCHOOL DISTRICT R2-J

Respondent.

I. INTRODUCTORY STATEMENT

The Colorado Department of Education received the request for hearing in this case on January 21, 2005. The Impartial Hearing Officer (IHO) heard the case on June 3, 2005, and June 7 through 9, 2005, in Loveland Colorado, and on June 6, 2005, in Denver Colorado. The parties filed written post hearing briefs on June 24, 2005, and the IHO also received written transcripts of the proceedings on the same date. The parties agreed to extend the time for issuance of a decision to July 8, 2005, as documented in the pre hearing order dated April 11, 2005. On June 28, 2005, the IHO received petitioner's Request to File a

Rebuttal Closing Brief and a Rebuttal Closing Brief to which the respondent objected on June 29, 2005, on the grounds that the specific attorneys handling this matter would be out of Colorado on vacation until after July 8, 2005, the date set for this IHO's decision. In an order dated July 1, 2005, the IHO held that in view of the objection, the IHO would not read or consider the petitioners' Rebuttal Closing Brief. Therefore, the IHO did not read or consider that brief in coming to this Decision.

The Individuals with Disabilities Education Act (IDEA), 20 USC §1415(f)(1), its implementing regulations, 34 C.F.R. §300.507, and the implementing regulations to the Colorado Exceptional Children's Educational Act (ECEA),1 CCR 301-8 2220-R-6.03(6) confer jurisdiction. The petitioner, [STUDENT], appeared through his parents, both of whose initials are [PARENT]. The School District appeared through Karen Piclin, Director of Special Education and Dennis Rastatter, Assistant Director of Special Education. Jack D. Robinson of the law firm of Spies Powers & Robinson represented the petitioner and W. Stuart Stuller and Cheryl M. Karstadt of the law firm of Caplan and Earnest represented the respondent.

II. ISSUES

The issues in this hearing are as follows:

1. Did the respondent offer to provide a free appropriate public education (FAPE) in the least

restrictive environment to the petitioner in the IEP dated December 16, 2003?

2. If not, what is the appropriate remedy, and in particular, is the petitioner entitled to a residential placement at the Boston Higashi School at no cost to the parents as the free appropriate public education in the least restrictive environment?

3. Did the petitioner provide sufficient notice to the petitioner to support a reimbursement claim?

III. FINDINGS OF FACT

1. The petitioner was born on [DOB], in Baltimore Maryland. He has two older brothers and a younger sister, all of whom live at home. One older brother recently received his GED degree, another attends Loveland High School and the younger sister is in first grade. [STUDENT] lived at home with both of his parents until he was enrolled in a residential placement in January of 2004.

2. The family moved to Colorado in 1996. Later in that same year, Sally J. Rogers PhD at the JFK Center at the University of Colorado Health Sciences Center diagnosed [STUDENT] with autistic disorder. [STUDENT] underwent treatment at that Center for autism. Autism or autism spectrum disorder is a behavioral syndrome involving impairment of communication skills and social development. Persons with autism often manifest stereotypical or perseverative behaviors. [STUDENT]'s autism evinces all of

these characteristics. Additionally, in [STUDENT]'s case, as in many cases of persons with autism, it also appears simultaneously (is comorbid) with mental retardation. His speaking vocabulary includes approximately 75 words in school, but he speaks many fewer words at home. His social interactions are significantly delayed. His academic performance reflects his mental retardation. Additionally, [STUDENT]'s case presents significant self care issues regarding his eating, sleeping, dressing and toilet training. He often displays inappropriate behaviors in the form of tantrums of varying degrees of severity to escape unwanted activities or situations.

3. In the fall of 2000, [STUDENT] entered kindergarten in the St. Vrain Valley School District at Niwot Elementary School. Special Education teacher Margret Wilson primarily provided special education services to him there. The kindergarten IEP dated February 13, 2001, called for one half hour per week of special education services in the general classroom, two hours per week in the special education classroom taught by Margaret Wilson, .75 hours per week of speech and language therapy, and one half hour per week of occupational therapy. Margaret Wilson had worked with [STUDENT] in his pre school setting prior to his entering kindergarten. She noted in the February 13, 2001, IEP that [STUDENT] had made significant progress over the year that she had worked with him. However, she opined that he had "difficulty generalizing skills," and often "gets frustrated with his inability to communicate his

wants/needs." A student generalizes when he applies a learned skill in various settings and at various times. For example, if a student learns to tie his shoes in school, he generalizes that skill by tying his shoes at home or in any other venue at a later time. Typically developing students generalize what they have learned, and students with developmental disabilities such as autism in some cases experience great difficulty with generalization. The Vineland Adaptive Behavior Scales test, the results of which appear in the kindergarten IEP, and which Margaret Wilson evaluated in the school setting and the parents evaluated at home showed significant discrepancies in [STUDENT]'s functioning between those two locations, confirming [STUDENT]'s serious problems with generalization of skills.

4. The February 2001 IEP included goals and objectives for communication skills, self care, independence and motor skills, social interaction and play skills, and academic functioning. The self care skills included assistance with washing, toilet training and dressing. That IEP also provided for extended school year services during the summer months to address [STUDENT]'s strong proclivity for regression. [STUDENT]'s autism inhibits him from retaining knowledge and skills that he has learned unless he reinforces them through constant repetition. Margaret Wilson testified and the IHO finds that while she was his teacher, [STUDENT] lost some of the progress he made over each weekend due to regression,

and that part of the time on Mondays was spent compensating for that regression.

5. Margaret Wilson continued as [STUDENT]'s special education teacher through his first grade year at Niwot Elementary School. He attended the special education classroom for the majority of his time in school. His Annual first grade IEP dated January 15, 2002, included self care skills in the areas of washing and dressing only.

6. In the fall of 2002, [STUDENT] transferred to Berthoud Elementary in the Thompson School District as a second grade student. In the spring of 2002, in anticipation of the transfer, Dee Ann Wilson, the special education teacher at Berthoud, visited Niwot and communicated with Margaret Wilson and the parents to facilitate a smooth transition to the new school for [STUDENT] The initial IEP at Niwot dated December 19, 2002, provided for education outside the general classroom for greater that 60% of the time. It also required adaptive physical education, occupational therapy, and speech and language therapy in addition to some time in the general classroom for mainstreaming purposes during administrative activities. The second grade IEP included goals and objectives relating to self care skills in the areas of washing and feeding. The previous goals and objectives for toilet training and dressing were eliminated. Another IEP dated April 17, 2003, during the spring of [STUDENT]'s second grade year, precisely repeats the self care goals and objectives of the December 19, 2002, IEP.

7. Although the succession of IEPs developed for [STUDENT] during his kindergarten through second grade years reveal no highly remarkable difficulties with his special education in the public schools, his home and community life presented a starkly contrasting picture. The evidence reveals that [STUDENT] led two disparate lives, one at school where he seemed to make adequate progress, and the other at all other locations, where extreme behavioral aberrations jeopardized the well being of [STUDENT]'s family. The IHO credits the descriptions of these discrepancies by [STUDENT]'s father based upon the totality of the circumstances including the testimony of numerous lay and expert witnesses regarding [STUDENT]'s tendency to lack generalization skills and to regress and the IHO's observations of [STUDENT]'s father's demeanor as a witness.

8. Beginning at age three or four, [STUDENT] developed sleep problems at night, frequently going to bed at odd hours and then waking up in the middle of the night to play videos or just wander around the house. [STUDENT] refused to sleep in a bed, and curled up on the floor to go to sleep. Additionally, at night [STUDENT] radically departed from his hygiene skills learned at school. By some time during the first grade year, [STUDENT] was toilet trained at school, and the annual IEP for that year omitted any reference to training in January of 2002. Likewise, the self care goals and objectives in the second grade IEPs did not include toilet training. However, at home, [STUDENT] continued disturbing self care

practices that had begun when he was three or four years old. At that time, [STUDENT] developed the habit of spreading night time bowel movements around his bedroom, on the carpet, bed, walls and curtains. The parents removed the carpets and curtains and put vinyl on the floors to make the room more impervious to these behaviors. Furthermore, the parents fitted [STUDENT] with jump suits and zipped them up from [STUDENT]'s back, restricting [STUDENT]'s access to his own private areas to discourage him from handling his own excrement. However, this did not deter him from continuing to act out this unhealthy scatological obsession.

9. Additionally, at home, [STUDENT] was a very picky eater and this trait degenerated to the point that he would only eat yogurt and crunchy foods, such as crackers and croutons, by his second grade year. If presented with other foods, such as fruits, vegetables, and meats, [STUDENT] engaged in temper tantrums, clearing the table of the foods he did not want by shoving them to the floor or by falling to the floor, kicking and screaming. Such a severely limited diet threatened his long term nutritional health.

10. [STUDENT] exhibited similarly inappropriate behaviors in church and in public places such as restaurants. In grocery stores, he attempted to pull down the crackers display, and would vociferously object if prohibited from doing so. These public manifestations of the behavioral aspects of [STUDENT]'s disability discouraged the family from

taking [STUDENT] out of the house, which imposed day care responsibilities on [STUDENT]'s grand parents and induced the parents to hire David, an attendant, to take care of [STUDENT] in the absence of other responsible family members.

11. In an attempt to control [STUDENT]'s behavioral problems, the parents took [STUDENT] to a psychiatrist, who prescribed sedative medicine. However, that medicine proved ineffective unless administered in such high doses that it rendered [STUDENT] passive and unresponsive.

12. The parents and grandparents decided to build new homes in proximity to one another to eliminate the inconvenience of travel on the frequent occasions when the grandparents needed to stay with and watch [STUDENT] By the time [STUDENT] entered the third grade at Berthoud Elementary, the two generations of the family had moved into their new homes. During the same time period, [STUDENT]'s domestic and community behavior had not improved while he continued to grow physically. His tantrums became more troubling and threatening to [STUDENT]'s younger sister and his mother. On occasion at home, but never at school, [STUDENT] directed his fitful anger toward his mother and sister, instead of just flailing about in a undirected fashion. Accordingly, the parents, by the fall of 2003, motivated primarily by their concerns about [STUDENT]'s home deportment, began to consider educational and residential alternatives to then current circumstances. In late October of 2003, the

parents filed an application with the Boston Higashi School to enroll [STUDENT] in a residential placement. On the Application form they indicated that [STUDENT] needed partial assistance with dressing and eating and total assistance with toilet training, washing, and sleeping. The parents specified as the areas of greatest difficulty "communication; toilet training; sleeping; ADL." (Activities of daily living.) The parents applied to Boston Higashi School in large measure out of concern for [STUDENT]'s dysfunctional behaviors away from school, and his inability to regulate himself and care for himself at home and in public. Upon investigation, however, the parents also became concerned about [STUDENT]'s frequent and prolonged tantrums in school as well. The parents accompanied by [STUDENT] visited the Boston Higashi school in October or November of 2003, without informing the school district.

13. At the time the parents applied to the Boston Higashi School, [STUDENT] had just turned 9 years old. He still slept on the floor of his bedroom in a one piece nylon suit to deny him access to his own feces. His parents still administered a suppository each night to induce a bowel movement before bed, to reduce the likelihood of one occurring during the night, which they also had done since approximately age 4. He was incontinent outside of school both during the day and night, even though fully toilet trained in school. He still ate an extremely limited diet. At home and in school, he engaged in extensive avoidance of unpleasant activities and foods. He

cleared the table in front of him of materials relating to activities he wanted to circumvent, by throwing the unwanted objects to the floor. He had frequent episodes of fussing, resisting and making a scene by lying on the floor while kicking and screaming. These behaviors limited his ability to learn the skills [STUDENT] needs to become a successful contributor to society.

14. Margaret Wilson met with [STUDENT] on November 28, 2003, to administer the Autism Diagnostic Observation Schedule test. Based upon her observation of [STUDENT] before and during the administration of that test, she concluded that [STUDENT] had regressed in his previously attained skills, but began to demonstrate some previously learned skills after spending some time with her. Additionally, based upon the sum of her experiences with [STUDENT], including her attempts to achieve generalization across environments with [STUDENT] and his family during the period she taught [STUDENT] in Niwot, Margaret Wilson concluded that [STUDENT]'s inability to generalize learned skills dictates that he needs a residential placement. She explained that the persistent guidance and training only available through a residential program will deeply ingrain [STUDENT] with proper behaviors so that they become the default behaviors of the child across environments. Based upon the totality of the circumstances, including Margaret Wilson's extensive experience in teaching [STUDENT] and other children with autism, her high degree of competence in

that area, and her demeanor on the witness stand, the IHO finds Margaret Wilson's testimony credible and persuasive.

15. On December 16, 2003, the parties met for the triennial IEP meeting. Both parents attended that meeting along with Dee Ann Wilson, [STUDENT]'s then current special education teacher, his regular education teacher, Beth Fraley, and several other special and regular education personnel at Berthoud Elementary. At that meeting, [STUDENT]'s father presented a list of written goals for [STUDENT] in the year 2004 that the parents wanted to have included in the IEP. Additionally, he stated that he did not think these goals were attainable in [STUDENT]'s present environment. He disclosed to the respondent for the first time his view that [STUDENT] should be placed in a residential program, and that the parents were looking at the Boston Higashi School and that he considered that school to be an appropriate placement for [STUDENT]

16. In response, the school district requested the opportunity to revise the draft IEP presented at the December 16, 2003 meeting and to consider the requested goals. The school district completed the final version of the December 16, 2003 IEP and sent it to the parents on January 15, 2004. The final version of the IEP, contained additional goals and objectives relating to [STUDENT]'s use of the bathroom, eating, and dressing, and contained new information regarding [STUDENT]'s proficiency in various areas. In that IEP, the District responded to

the written goals for 2004 submitted by [STUDENT]'s father at the IEP meeting. However the placement recommendation in the final version remained unchanged, in Berthoud Elementary School, consisting of direct instruction in the special education classroom for 18½ hours per week and indirect support in the general classroom for 12 hours per week, occupational therapy for 1/2 hour per week and speech language therapy for 1 hour per week.

17. On December 18, 2003, Boston Higashi School accepted [STUDENT]. On December 19, 2003, counsel for the petitioner sent a letter advising the school district that in accordance with 20 U.S.C. 1412(a)(10)(C)(iii)(1)(bb), the parents intended to remove [STUDENT] from the District and enroll him in a private school and seek reimbursement of all related costs from the District.

18. On January 12, 2004, [STUDENT] enrolled as a residential student in the Boston Higashi School. That school has residential and day students, all of whom have a diagnosis of autism. It is housed on a campus like property, with a residential facility located in proximity to the classroom and physical education buildings. The staff at the Boston Higashi School supervises [STUDENT] 24 hours per day seven days per week for approximately 44 weeks per year. The other eight weeks per year [STUDENT] lives with his family in Berthoud Colorado. The eight weeks at home are divided up into several breaks interspersed throughout the year. The parents stay in close communication with school officials regarding

[STUDENT]'s behaviors while at home on break. Those visits are carefully planned and documented. During the last break at home [STUDENT]'s self care skills and behaviors improved significantly. He no longer sleeps in a nylon suit on the floor. He now sleeps in a bed in his room at home. His toilet training has improved to the point that he has some accidents at night, but is completely toilet trained at home during the day. He eats a variety of healthy foods. Additionally, in the latest visit the frequency and severity of his adverse and resistive behaviors have mitigated.

19. The parties presented a number of expert witnesses at the hearing. In addition to the testimony of Margaret Wilson noted above, the petitioner presented Rosemary Littlefield, executive director of the Boston Higashi School. She testified that the Higashi School attempts to develop the whole child, including physical stamina, emotional stability and intellectual capacity in an educational program called "daily life therapy." She described the program at the Boston Higashi School as a seamless process, keeping the students busy constantly with rigorous physical exercise, academic education and field trips into the community, the latter usually on both weekend days. She testified that the residential students have 24 hour per day supervision, with the night time staff and day staff communicating daily regarding the events which occurred while they were on duty respectively. The Boston Higashi IEP contains goals and objectives for both the residence and the day

program. She testified that the petitioner came to the school with great academic skills on paper, but that his daily living skills were less developed than indicated. She opined that the residential placement is an appropriate placement for [STUDENT], based upon his progress in the day and residential settings at the Higashi School and his need for that setting to overcome his obstacles to lead a meaningful and quality life. Dr. Ann Roberts Ph.D. in clinical psychology and on the staff half time at the Boston Higashi School, testified that the petitioner needed a residential placement to overcome his tendency for regression in his learned skills. Ellen Hanson Ph.D. psychologist at Children's Hospital in Boston opined in her report and through testimony that [STUDENT] required a substantially separate residential setting on account of his tendency toward regression, and safety issues including his failure to follow commands and his aggressive behavior at home toward his younger sister on a break from the Boston Higashi School. Additionally, the petitioner presented the testimony and report of Diane Osaki O.T.R. in which she asserted that the petitioner needs a 24 hours per day year round education due to his maladaptive behavior, intensity of maladaptive behavior and limited ability to receive educational benefit due to his significant and complex learning and behavioral needs.

20. The respondents presented the expert testimony of Drs. Phillip Strain and Glen Dunlap. Both of these experts rendered their opinions based upon a review of various records supplied by the

School District. Neither produced written reports nor personally interacted with [STUDENT] or his educational providers or parents. Both had high qualifications in the field of the education of children with autism and the managing of behaviors of those children. Dr. Strain testified that peer reviewed research suggests that students with autism demonstrate more problem behaviors when their social contacts are confined others with the same syndrome. Additionally, he opined that the IEP proposed by the respondent would provide an appropriate education to [STUDENT] because, its implementation would be, at least in part, in the presence of typically developing children and because that implementation would involve fairly intensive data collection. Dr. Strain disagreed with the teaching philosophy at the Boston Higashi School, and characterized it as the "train and hope" method. However, Dr. Strain was generally unfamiliar with [STUDENT]'s sleeping, eating and incontinence problems before he left for the Boston Higashi School. Accordingly, Dr. Strain offered no specific or structured solution to [STUDENT]'s problems generalizing his learned skills to home and community, other than to be educated in an integrated environment in school. Dr. Dunlap generally agreed with Dr. Strain. Additionally, he acknowledged that [STUDENT]'s challenging behaviors represent an impediment to his participation and his quality of life and his education. Dr. Dunlap opined that [STUDENT]'s problem behaviors at home could be dealt with at home, but that he doubted it would be a very simple thing to do. Dr. Dunlap was also not familiar

with the particulars of [STUDENT]'s sleeping, eating and incontinence problems before he left for the Boston Higashi School. Accordingly, he also did not offer a specific or structured solution to [STUDENT]'s problems generalizing his learned skills to home and community.

21. Based upon the totality of the circumstances, the IHO credits the lay and expert testimony as specified above of Margaret Wilson, Rosemary Littlefield and Ann Roberts and finds that specified testimony as fact. Those witnesses demonstrated familiarity with the individual behaviors of [STUDENT] in his school and residential settings, and provided understandable, specific, structured and planned solutions to the chief problems which threaten [STUDENT]'s integration into society in a meaningful way when he graduates from school and which his educators must confront to provide him with some educational benefit.

22. While the evidence in general and the December 16, 2003, IEP in particular suggest that [STUDENT] made some progress in public school prior to that date, due to his inability to generalize his learning experiences at school to home and community environments, [STUDENT] was not able to apply this progress in those other contexts. Additionally, [STUDENT] continued to manifest behavior problems in school, and to an even greater extent at home and in the community. These behavioral problems precluded [STUDENT] from participating in his community and integrating into society by engaging

in such commonplace activities as eating in restaurants, going to church and to the grocery store. Accordingly, the December 16, 2003, IEP did not offer [STUDENT] a free appropriate public education.

23. In petitioner's case in chief, he offered no evidence concerning the specific costs of the reimbursement sought pursuant to 20 USC § 1412(a)(10)(C)(ii). During the respondent's case, however, the petitioner made an offer of proof, which was reduced to writing and sent to the IHO by facsimile dated June 14, 2005. The respondent stipulated that the offer of proof represented [STUDENT]'s father's testimony, but did not stipulate to the factual accuracy of the testimony, nor waive the arguments made in its motion to dismiss following the petitioner's case in chief which asserted that the petitioner failed to satisfy its burden of proof on the costs of reimbursement by omitting any evidence regarding actual costs of tuition, transportation, and any other aspects of the monetary claim.

24 The IHO finds that the professionals on the staff of the School District who testified in this matter are competent and diligent and that the petitioner needs a residential placement because of the unique character of his disability, and not due to any shortcomings on their part.

IV. DISCUSSION AND CONCLUSIONS

A. The Testimony of Respondent's Experts is Admissible.

The IHO admits the testimony of Dr. Strain and Dr. Dunlap, despite the fact that respondent produced no written evaluation authored by those experts five days before the hearing. The plain language of 20 U.S.C. §1415 (f)(2)(A) requires disclosure 5 business days prior to a hearing only of evaluations completed by that date. Additionally the disclosure requirement applies only to evaluations that the party intends to use at the hearing. Likewise, the applicable Colorado regulation 1 C.C.R. 301-8, 2220-R-6.03(2) only requires the prior disclosure of evaluations completed by that date and the recommendations based upon those evaluations. The IHO construes this language to refer to written evaluations that the party intends to introduce into evidence. The statutes and regulations which govern this proceeding do not expressly require that a written report precede the testimony of a witness who offers expert opinions, and this IHO will not imply such a requirement.

The Colorado Exceptional Children's Educational Act Rules at 1 C.C.R. 301-8, 2220-R-6.03(6)(a)(iii) require the hearing officer to "schedule a pre hearing conference at which the issues will be identified and the specific requests of the parties determined." If either party deemed itself prejudiced by the potential failure of the opposite party to produce a written evaluation of one of its expert witnesses, that party could make a request for a written evaluation at the

pre hearing conference. However, in the absence of such a request and a favorable ruling on it, a party has no right to insist that the experts called by the opposition produce a written evaluation which that party will receive within 5 business days before the hearing. In this case, neither party made such a request and both parties produced testimonial evidence from expert witnesses who did not provide written evaluations. The IHO considered fully the testimony of Drs. Strain and Dunlap in making this decision.

B. Residential Placement and FAPE

1. Burden of Proof

The Supreme Court has recently granted certiorari on the question regarding which party bears the burden of proof in cases under the Individuals with Disabilities Education Act, based upon a split the circuit courts. *Weast v. Schafer, 377 F.3d 449 (4th Cir. 2004), cert. granted, 161 L. Ed. 2d 104, 125 S. Ct. 1300 (2005).* However, while awaiting guidance from the Supreme Court, this IHO will attempt to follow the existing law on the issue. Since in this case the petitioner attacks the IEP offered by the school district, it bears the burden of proving that the IEP does not afford a free appropriate public education. *Johnson v. Independent School District* 921 F2d 1022 (10th Cir. 1990) Additionally, the petitioner urges a residential placement as the least restrictive environment as opposed to the school district's proposal

for schooling primarily in a special education classroom in an integrated public school. Several authorities hold that the burden of proof should fall on the party advocating the more restrictive placement, in this case the petitioner. See e.g. *Poolaw v. Bishop 21* IDELR 1 (D. Ariz. 1994) Accordingly, the petitioner must carry the burden of proof to demonstrate his need for a residential placement in order to achieve a Free Appropriate Public Education (FAPE).

2. The Petitioner's Need for a Residential Placement

The following provision of IDEA governs this proceeding:

> *Reimbursement for private school placement*
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 USC §1412(a)(10)(C)(ii). Thus, in this case, the IHO must decide whether the December 16, 2003, IEP actually sent to [STUDENT]'s parents on January 15, 2004, shortly after the enrollment in Boston

Higashi School, provides a free appropriate public education to [STUDENT].

Any analysis regarding whether the December 16, 2003, IEP offers the petitioner a FAPE must begin with the proposition that the school district's obligation to [STUDENT] extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit to him. *Bd of Education v. Rowley,* 458 U.S. 176 at 200 (1982). However, in discussing the meaning of "some educational benefit" the Supreme Court in *Rowley* focused upon the Congressional goal of achieving a degree of self sufficiency for the student, so that in later life he will impose fewer burdens on the public fisc. The Court stated as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to*

benefit from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. n23

n23 This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep., at 9. See also H. R. Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments

> from public funds." 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024-37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).

The parties in this case produced a thorough and competent record regarding the nature of autism and autism spectrum disorder and of [STUDENT]'s particular affliction within the autism spectrum. They agreed that the disorder encompasses a wide range of characteristics, but that [STUDENT] manifests the principal ones, deficiencies in social relatedness, lack of communication skills, and stereotypical behavior. Additionally, [STUDENT] like many, but not all, of his autistic counterparts, suffers from mental retardation. However, in [STUDENT]'s case certain additional characteristics not uncommon among persons with autism stand out. He has particular difficulty with generalizing his learned skills to times and places outside of school. Furthermore, unless he continuously reinforces them, he regresses and loses those skills, at least temporarily. Accordingly, the education of [STUDENT] presents a special challenge to him and to his educators. He must not only learn to overcome his social and communication difficulties, and his academic problems occasioned by his mental retardation, but his teachers must also devise a method for him to generalize what he learns across a variety of environments and he must receive

constant attention and reinforcement to maintain his skills.

Importantly, [STUDENT]'s disability afflicts him in ways which threaten to limit or prevent his independence after he leaves a structured educational environment. That disability affects skills that most of us take for granted including eating, sleeping, toilet training and engaging in elementary communication and appropriate behaviors. These skills are most often practiced outside of the educational environment, and it is not enough that [STUDENT] learn to do them only in school. Unless [STUDENT] receives some educational benefit in these areas while he is young so that he can generalize them across environments, he will never achieve the goal of self sufficiency referred to in *Rowley* and in the Congressional mandate.

On its face, the December 16, 2003, IEP certainly addresses the substantive aspects of [STUDENT]'s autism, his social and communicative problems and his mental retardation. The IEP demonstrates a monumental and genuine effort on the part of the school district to improve [STUDENT]'s performance in a number of areas affected by his autism, including gross motor skills, communication, fine motor skills, self care skills, and academic skills in vocabulary and math. Furthermore, the school district would attempt to achieve these goals in a somewhat integrated educational milieu, which IDEA favors by requiring that disabled students receive their special education services in the least restrictive environment. See 20

USC § 1412(a)(5). The expert witnesses presented by the respondent affirmed that the IEP attempts to provide a free appropriate public education to [STUDENT]. However, those experts were not fully apprised of the details concerning the overwhelming problem facing the very competent and sincere people in the school district who would attempt to reach the goals and objectives enumerated in the December 16, 2003 IEP, because they did not appreciate the dichotomy in [STUDENT]'s behaviors and performance in school as opposed to all other places. Even if [STUDENT] were to attain all of those goals and objectives in his December 16, 2003, IEP **in school**, the evidence as a whole showed that he would not be able then to transfer his skills to use them in other environments, at home, in church, in grocery stores and in restaurants. The evidence also suggests that he would not be able to retain those skills before he began to lose them through regression. Furthermore, that IEP adopts no specific strategies to enhance the possibility or probability that [STUDENT] will be able to avoid regression and to generalize what he learns, so that he might achieve some benefit from all of the education offered to him.

Certainly, the law does not require the school district to take on the task of maximizing [STUDENT]'s potential, but [STUDENT] will derive no benefit at all from attaining goals and objectives in school if he cannot replicate any of his accomplishments anywhere else. The skills involved are not embellishments and frills. They are the most basic

ingredients to successful social functioning, such as eating, sleeping, dressing, toilet training, communicating, and proper behavior.

While overall, the respondent relies on the proposition that exposure to typically developing students would help [STUDENT] generalize his skills, that strategy did not prove successful before December of 2003. By that time, he had attained the age of nine years, and he still lacked basic skills outside of the school environment. Dr. Strain's testimony that a residential placement would not help [STUDENT] generalize must be evaluated in light of [STUDENT]'s actual experience. He had not generalized essential and basic skills as of late 2003, and he has done better since. The respondent's experts were not specific regarding what measures [STUDENT]'s parents might take in their home to train [STUDENT] and to fulfill their responsibility as partners in his education. Dr Dunlap reassured that he has worked in home environments a great deal in the past, and that he had confidence that [STUDENT]'s problems at home could be resolved, but without any more specificity, he allowed that it would probably not be a very simple thing to do. The evidence amply demonstrates that children with autism need structure, predictability and planning. Neither Dr. Strain nor Dr. Dunlap offered a structured predictable plan to deal with [STUDENT]'s failure to generalize his skills across environments.

All education has as its purpose the advancement of knowledge and skills so that the student can

reasonably retain them and apply them in other contexts, at other times, and in other places. If, as one of the purposes of special education under IDEA confirmed in *Rowley*, public schools must accord some educational benefit in terms of advancing the self sufficiency of severely disabled students like [STUDENT], then the IEP must address the issues of generalization and regression. Self sufficiency entails more than the mastery of skills in school. [STUDENT] will not function well in society after he leaves school, if by that time, he is only toilet trained in school, but nowhere else. He will also not come any closer to self sufficiency than he was in December of 2003 if he has a 76 word speaking vocabulary in school, but can on his own use far fewer words in all other venues. [STUDENT] will not realize any measure of independence after he graduates from high school if he self regulates his avoiding, resistive and difficult behaviors much more effectively in the classroom than he does in restaurants, churches, grocery stores and at home.

The petitioner persuasively contends that only a residential placement can promote [STUDENT]'s aim of self sufficiency by addressing his inability to generalize and retain what he learns. He presented convincing evidence that sustained supervision for 24 hours per day over long periods with some breaks has a reasonable chance of producing that result. Indeed, [STUDENT]'s father has noticed a significant improvement in numerous aspects of [STUDENT]'s behaviors outside of school in his latest visit home on

break from the Boston Higashi School, and the IHO has credited his testimony. The petitioner prevails in his proof that the December 16, 2003, IEP fails to provide a FAPE on the basis that it does not designate a residential placement designed to afford [STUDENT] an opportunity to conquer his tendency, resulting from his disability, to lose his skills through regression and to confine their application to only a single environment, school.

Of course, this hearing entails the finding that the least restrictive environment for [STUDENT] is a residential placement. However, the evidence in this case provides no coherent method for him to surmount the difficulties posed by his severe inability to generalize his learning and to retain it without regression other than a residential placement. [STUDENT]'s need to develop his basic living skills to the point that he can successfully practice them outside of school, such as verbally communicating, toilet training, eating, dressing and self regulation of his behaviors, which, according to Dr. Dunlap, represent an impediment to his participation and his quality of life and his education, overrides any benefit currently attained from integration with typically developing peers. Ultimately, unless [STUDENT] improves these basic skills and retains them, he will not achieve any of the self sufficiency gains relied upon in *Rowley* and in the legislative record to which it refers, which determine whether the IEP is reasonably calculated to confer some educational benefit.

Both parties have urged the IHO to consider the criteria for determining whether a placement constitutes the least restrictive environment set forth in *L.B. v. Nebo School District* 379 F.3d 966 (10th Cir. 2004). However, the Tenth Circuit adopted those criteria to determine "whether the least restrictive environment mandate in the IDEA has been violated by a school district." *Nebo School District* supra at 976. In the present case, the petitioner does not accuse the school district of violating the least restrictive environment requirement in 20 USC § 1412(a)(5), but rather advocates for the more restrictive environment himself. Therefore, that test is not technically applicable. However, the thrust of that *Mt. Nebo* test is to balance the benefits to the child of the more against the less restrictive placement. In the present case, the IHO reluctantly has struck that balance in favor of the more restrictive placement in the anticipation that [STUDENT] will gain the ability to generalize positive and essential behaviors and skills and retain them as the result of that placement.

3. The Relationship Between the Need for Residential Placement and [STUDENT]'s Learning Problems

The school district contends that the parents' desire for a residential placement stems not from any of [STUDENT]'s educational needs, but rather from the parents' desire to alleviate their busy schedule. The school district relies upon the dichotomy between learning requirements and social, medical or

emotional problems distinct from the child's learning problems drawn in *Gonzalez v. Puerto Rico Dep't of Education*, 254 F.3d 350, 352-53 (1st Cir., 2001) However, in the present case, the petitioner's need for a residential placement derives specifically from his learning problems relating to autism. The record is replete with evidence of [STUDENT]'s inability to generalize and the wide gap between his demonstrable skills in school and elsewhere. The record also well documents [STUDENT]'s inability to retain what he learns independently. Accordingly, in this case, [STUDENT]'s requirement of a residential placement results from educational considerations, and in particular, educational factors which will influence his degree of independence and self sufficiency as an adult. Those factors include skills essential to functioning in society, such as toilet training, eating, dressing, communicating verbally with a minimal vocabulary and behaving appropriately. In some of those areas he made progress in public school, but has not shown the ability to generalize to other settings. Since the need for a residential placement arose from educational considerations, the petitioner is entitled to reimbursement.

C. Petitioner's Notice of Rejection of Proposed Placement

The respondent contends that petitioner's reimbursement should be reduced or denied, because of failure to give proper notice of rejection the placement proposed by the school district pursuant to 20 USC

§ 1412(a)(10)(C)(iii)(I). The respondent appears to concede that the attorney for petitioner gave written notice of that rejection on December 19, 2003, but claims that "No notice was given after the IEP was finalized that the IEP was rejected." (Written Closing Argument of Thompson School District R2-J, page 28) The District did not finalize and send the December 16, 2003, IEP to the petitioner until January 15, 2004, three days after the petitioner had enrolled in the Boston Higashi School.

However, parents must give the ten day notice provided for in 20 USC § 1412(a)(10)(C)(iii)(I)(bb) prior to the removal of the child from the public school, regardless when the school district finalizes the IEP. Apparently, the petitioner concedes that the petitioner provided notice more than ten days prior to that removal, but contends that the notice was premature, since it was given before the IEP was finalized. However, 20 USC § 1412(a)(10)(C)(iii)(I)(aa) does not require notice after finalization of the IEP, since the petitioner may give notice of the rejection of the "placement **proposed** by the public agency." (emphasis added) (id) Here, the respondent **proposed** the Berthoud Elementary School placement in the draft IEP tendered to the parents at the December 16, 2003, IEP meeting, and the letter from petitioner's counsel of December 19, 2003, rejected that **proposed** placement. Thus, the notice complies with the requirements of the statute.

Additionally, the respondent urges the IHO to deny reimbursement on the basis of 20 USC

§1412(a)(10)(C)(iii)(III), which provides that the cost of reimbursement may be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." The IHO is not a court and cannot make a "judicial finding." Only a court can exercise this judicial function. In contrast, the statute makes clear that either "a court or hearing officer" upon appropriate findings may require the school district to reimburse the parents for the cost of enrollment in a private elementary or secondary school. 20 USC §1412(a)(10)(C)(ii). When the Congress conferred powers on impartial hearing officers in addition to the judiciary in IDEA, it did so explicitly. Therefore, the IHO concludes that the petitioner fulfilled IDEA's notice requirements.

C. The Remedy

The respondent claims that the petitioner seeks an inappropriate remedy, because the petitioners failed to produce evidence of specific reimbursement costs in his case in chief and that the offer of proof submitted after the hearing was insufficient to carry the petitioner's burden of proof. The IHO agrees that the offer of proof does not contain sufficient detail upon which to base an order requiring the respondent to pay to petitioner a sum certain. In reviewing that offer of proof, many questions arise concerning the appropriateness of the costs. For example the costs of the assistant and of having both parents accompany [STUDENT] on all trips may not be justified. Additionally, petitioner offered no evidence in this case

regarding the necessity of either or both parents attending all training trips. These examples are not meant to be all inclusive.

However, the IHO notes that parents seeking tuition reimbursement do not uniformly choose to offer specific evidence regarding costs prior to determination of their right to reimbursement. For example, in *Ash v. Lake Oswego School District* 766 F.Supp. 852 (District of Oregon, 1991) the plaintiffs in the United States District Court, parents of a child enrolled at the Boston Higashi School, offered no evidence of specific cost amounts in their case in chief in that court. After finding the right to reimbursement, the Court ordered, "The parties must submit supplemental memoranda addressing the issue of the specific amount of reimbursement appropriate unless they can reach an agreement on the amount of reimbursement." *Ash* supra at 865. The Court in that case did not dismiss the plaintifff s entire claim for failure to produce evidence on actual costs in the hearing on the merits. The parties may well agree upon the costs after a finding of entitlement to reimbursement, and it would unduly burden the proceedings to require the submission of such specific evidence as part of the petitioner's case in chief in a tuition reimbursement case before the right to reimbursement has been established. Accordingly, the IHO here will follow the lead of the Court in *Ash* and not dismiss the request for reimbursement for failure to produce evidence of specific costs.

Therefore, the IHO will enter a general order requiring the respondent to reimburse the costs of enrollment at the Boston Higashi School since January 12, 2004. The parties should then attempt to reach agreement on those costs. The remedies available to the parties if they fail to reach agreement on costs are beyond the scope of this Decision.

V. DECISION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. The petitioner's motion to strike the testimony of Dr. Dunlap and Dr. Strain is denied.

2. The respondent shall reimburse [STUDENT]'s parents the costs of enrollment at the Boston Higashi School since January 12, 2004, and continuing until his placement is changed pursuant to law.

Dated in Denver, Colorado, this 8th day of July, 2005.

VI. APPEAL RIGHTS

Enclosed with this decision, please find a copy of your appeal rights under the ECEA, 1 CCR 301-8 2220-R-6.03(9) through (14).

Respectfully submitted,

Joseph M. Goldhammer, Esq.
Impartial Hearing Officer
1563 Gaylord Street
Denver Co 80206
(303) 333-7751

CERTIFICATE OF SERVICE

I certify that on July 8th, 2005, I sent a copy of the **IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION** by certified Mail to the following:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMPSON R2-J SCHOOL DISTRICT,

Plaintiff-Appellant,

v.

LUKE P., by and through his parents and next friends JEFF and JULIE P.,

Defendants-Appellees.

NATIONAL SCHOOL BOARDS ASSOCIATION, et al.,

Amici Curiae.

No. 07-1304

ORDER

(Filed Sep. 25, 2008)

Before **BRISCOE**, **GORSUCH**, Circuit Judges, and **PARKER**, Senior District Judge.*

---

* The Honorable James A. Parker, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

Appellees' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

STATUTORY PROVISIONS

Section 1400 of the IDEA provides in part:

Congressional statements and declarations.

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they [children with disabilities] have the skills and knowledge necessary to enable them –

(i) to meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible.

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7)(A) The Federal Government must be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

20 U.S.C. §§ 1400(c)(1), (3), (4), (5)(E)(i)(ii), (6), and (7)(A).

(d) Purposes

The purposes of this title are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

20 U.S.C. § 1400(d)(1)(A).

* * *

Section 1401 of the IDEA provides in part:

Definitions.

(8) Free appropriate public education – The term 'free appropriate public education' means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(11) Individualized education program – The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

(22) Related services – The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be with a disability to benefit from special education, and include the early identification and assessment of disabling conditions in children.

(25) Special Education – the term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including–

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(30) Transition services – The term 'transition services' means a coordinated set of activities for a child with a disability that –

(A) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual student's needs, taking into account the student's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

20 U.S.C. §§ 1401(8), (11), (22), (25)(A)(B), and (30)(A)(B)(C).

* * *

Section 1412 of the IDEA provides in part:

State eligibility.

(a) In general

A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general – A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(2) Full educational opportunity goal – The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

20 U.S.C. § 1412(a)(1)(A) and (2).

* * *

Section 1414 of the IDEA provides in part:

Evaluations, eligibility determinations, individualized education programs, and educational placements.

(d) Individualized education programs

(1) Definitions – As used in this title:

(A) Individualized education program – The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes–

(i) a statement of the child's present levels of educational performance, including –

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to –

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in

extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph.

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of–

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and

(viii) a statement of –

(I) how the child's progress toward the annual goals described in clause (ii) will be measured;

(II) how the child's parents will be regularly informed (by such means a periodic report cards), at least as often as parents are

informed of their nondisabled children's progress, of –

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(3) Development of IEP

(B) Consideration of special factors – The IEP Team – shall

(i) in the case of a child whose behavior impedes his or her learning or that of others, consideration, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(4) Review and revision of IEP

(A) In general – The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team –

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address–

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conduced under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(IV) the child's anticipated needs; or

(V) other matters.

(5) Failure to meet transition objective – If a participating agency, other than local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

20 U.S.C. § 1414(d)(1)(A), (3)(B)(i), (4)(A) and (5).

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No. 08-800

Supreme Court, U.S.
FILED
JAN 8 - 2009
OFFICE OF THE CLERK

In the
Supreme Court of the United States

LUKE P., a Minor, By and Through His Parents and Next Friends, JEFF P., *et ux.*,

Petitioners,

vs.

THOMPSON R2-J SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* AUTISM SPEAKS, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Autism Speaks is a national, not-for-profit organization dedicated to increasing awareness of autism spectrum disorders; funding research into the causes, prevention, treatments and potential cures for autism, honoring and enforcing state and federal statutory entitlements, supporting effective and lasting interventions, and advocating for the needs of affected families.

Autism Speaks is the largest not-for-profit organization in the world with resources dedicated to autism research, education and treatment. It has chapters across the United States, Canada, and the United Kingdom. Autism Speaks works closely with federal, state and local governments, as well as the U.S. military, to meet the needs of the ever-growing population of children with autism and parents of children with autism for access to treatment and education.

Autism Speaks can offer valuable insights into the unique special education challenges faced by children with autism and their families, the special teaching approaches needed to get children with

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[1] Pursuant to this Court's Rule 37, we note that no counsel for any party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of Autism Speaks' amicus brief and counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

autism to learn and to "generalize" their skills across a variety of settings, and why this population, without intensive and consistent teaching support, is particularly at risk to *lose* skills and to regress.

Inasmuch as autism is universally recognized as a "pervasive developmental disorder," meeting the unique and varied needs of children with autism means developing a truly individualized and comprehensive educational program that is *reasonably calculated* to produce a meaningful and lasting educational benefit. This does not entail any guarantee of outcome, but it does speak to the need to design programming that would be reasonably *expected* to address and remediate a variety of deficit domains. There can be no such expectation absent a program that is "reasonably calculated."

The Tenth Circuit's inadequate "some benefit" standard cannot hope to meaningfully address a pervasive developmental disorder any more than a "band-aid" would be "reasonably calculated" to address the needs of someone badly injured in an automobile accident.

Autism Speaks can speak to the potential impact of the decision below on thousands of families across the nation who struggle to create productive and self-sufficient members of society. A bare "some benefit" standard is not reasonably calculated to promote even a modicum of independence and self-sufficiency. To follow that kind of standard where children with autism are concerned is to simply kick the can down the road, starting a countdown that, in many cases, ultimately will require *lifelong* institutional care.

The Tenth Circuit reversed the district court's reimbursement award in favor of Luke and his parents upon an analysis that erroneously equates an IEP that is "reasonably calculated" to provide a meaningful and lasting educational benefit with an IEP that is "guaranteed" to optimize or maximize Luke's potential.

Luke's parents have never sought any guarantees, nor have they requested any IEP "guaranteed" to optimize or maximize Luke's potential. That kind of unduly elevated standard was never genuinely at issue here. Luke's parents have, however, advocated for meaningful educational gains that are lasting, and not fleeting or illusory. They have advocated for an Individualized Educational Plan ("IEP") that is at least "reasonably calculated" to generate those kinds of gains. Indeed, while Luke's deficits are varied and profound, this is the kind of IEP that every child is entitled to under the IDEIA.

The Tenth Circuit's bare and selective "some benefit" standard is inadequate to address a pervasive developmental disorder such as autism, which seriously impairs a variety of Luke's functions. Without meaningful programming to address generalization (i.e. being able to display skills across different environmental settings, with different people), the school district's proposed IEP was not "reasonably calculated" to provide Luke with a meaningful educational benefit.

The district court so held, as did the two hearing officers in successive administrative proceedings. The district court correctly accorded due weight to the findings of the education experts. The

Tenth Circuit, however, improperly substituted its judgment for the judgment of the educational experts. The Tenth Circuit then compounded its error by creating an unduly low "some benefit" standard of care that is inconsistent with the IDEIA and Congressional intent.

Certiorari should be granted so that this Court can provide appropriate direction to the Tenth Circuit and to any other court that might be tempted to adopt an impermissibly low standard of care.

PRELIMINARY STATEMENT

Autism, a pervasive and devastating developmental disorder under the DSM-IV[2], is a 24-7 workaholic that does not know how to take a break or holiday. Rigidity, inflexibility, inattention, interfering behaviors, self-directedness and severe social and communication deficits are among the many problems that normally must be addressed in a comprehensive and systematic manner.

Unlike typically developing children, children with autism normally do not learn "incidentally" from observing what other children do. Unlike typically developing children, children with autism also have tremendous difficulty learning in a group setting. This means that children with autism necessarily must be taught differently, often with a great deal of one-to-one instruction. In order to "generalize" skills ostensibly being taught in the

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[2] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (4th ed. 2000).

classroom, most children with autism also must be taught across a variety of environmental settings.

Without intensive teaching and intervention, children with autism typically will not "generalize" the skills they ostensibly are learning in school, *i.e.*, being able to display the skill across different environments. Parents and educators must expect to have to employ the educational equivalent of a "full court press" to ensure meaningful, lasting progress and prevent regression.[3] Unfortunately, there are no easy shortcuts.

Without appropriate and effective teaching and intervention, autism ruins lives and destroys families. Absent appropriate and effective intervention, children with autism grow up to be adults with autism, often requiring costly and sometimes lifelong institutional care.[4] The only way for our society to avoid the social and financial cost of lifelong institutional care is to provide educational programming that is designed (*i.e.*, reasonably calculated) to meaningfully promote independence and self-sufficiency.

There simply must be a concerted effort to get the student to "generalize" skills ostensibly being taught in isolation. If there is no such effort by the

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[3] Prelock, Patricia E., AUTISM SPECTRUM DISORDERS 354 (2006)

[4] Residential, institutional care may come at a cost in excess of $300,000 *per year*. Accordingly, particularly in this time of economic crisis, it is all the more incumbent upon our nation to invest the effort and funds now to promote independence and self-sufficiency, and therefore avert lifelong residential placements.

school district, it is difficult, if not impossible, for the anticipated educational benefit to be real and lasting.

Considering that the National Institutes of Health and the Center for Disease Control are reporting that 1 in 150 children born today will be diagnosed with an autism spectrum disorder (nearly 1 in 100 boys),[5] effective and timely intervention is absolutely critical, not only for the child and the child's family, but for society in general.[6]

As a society, given the sheer magnitude of the problem, we cannot afford *not* to make the investment. In the past, we lost thousands to institutional care because we did not know how to effectively remediate autism. Indeed, a large part of the problem was a failure to properly identify autism.

Now that educators and scientists have acquired far more effective teaching methods and greater empirical knowledge, we cannot afford to lose an even larger generation to life-long institutional care because of an unwillingness to make the investment needed to promote independence and self-sufficiency.

In the seminal case of Board of Educ. v. Rowley, 458 U.S. 176 (1982), a case decided under

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[5] Statistically, the NIH and CDC both report that males are approximately four more times as likely as females to be diagnosed with autism.

[6] Until relatively recently, autism was a rarely-diagnosed and little-known condition, but is now more prevalent among children than Down syndrome, diabetes, cystic fibrosis, and cancer.

the Education for All Handicapped Act, this Court established the basic floor of educational opportunity as requiring a meaningful educational benefit – a benefit flowing from "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."

The IDEA, and its reauthorization as IDEIA, post-dated Rowley. This Court should grant *certiorari* to clarify the substantive requirements of the Act. This Court should clarify that IDEIA's minimum standard of care is a "meaningful benefit" standard, and that a "some benefit" standard of care is inconsistent with the letter and spirit of the Act. This Court need not offer any guarantee of outcome. However, it should declare that a school district's IEP must be "reasonably calculated" to provide the student with a meaningful and lasting educational benefit. Just as this Court declared in Rowley, a student is entitled to "educational instruction [that is] specially designed to meet the unique needs of [the student]." 458 U.S. at 188-89.

In the case at bar, while Luke was being educated by the Thompson R2-J School District's ("District") watch, Luke's "autism" scores on the Childhood Autism Rating Scale (CARS) apparently went from "mild to moderate" in 2001 to "severely autistic" in 2003. Whatever teaching the District believed it was presenting to Luke in isolation, the record reflects, and three levels of judicial review apparently concluded, that Luke was not meaningfully "generalizing" the teaching that he was being presented with. Luke was not able to display

his learning across different settings and environments to demonstrate that he had truly and genuinely learned. If anything, Luke was regressing.

Although Congress has never expressly defined what a "free and appropriate education" ("FAPE") must consist of (presumably because of the Act's "individualization" requirement), twenty seven years ago, this Court held (construing the Education for All Handicapped Children Act) that the educational benefit must be meaningful and more than a mere *di minimus* benefit. Rowley, 458 U.S. 176 (1982). *See also* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 (10th Cir. 1998). *Cf.* Frank G. v. Board of Educ., 459 F.3d 356 (2d Cir. 2006), *cert denied*, Board of Educ. v. Frank G., 169 L.Ed.2d 325 (2007) ("While the IDEIA does not require states to maximize the potential of handicapped children...it must provide such children with "meaningful access" to education...[the IEP] must be "likely to produce progress, not regression") (internal citations omitted); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (IEP must be likely to produce progress, not regression).[7]

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[7] There is, at best, *di minimus* progress where, as here, a student like Luke is not "generalizing" the skills the school district was presenting to him in isolation. Moreover, the disturbing change in Luke's assessed autism "severity" on his CARS scores from 2001-2003 would strongly suggest regression. Whatever may be argued by way of semantics, it is axiomatic that regression is inconsistent with the concept of educational "benefit."

In Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004), *reh'g en banc denied*, 2005 U.S. App. LEXIS 5631, *cert. denied*, Hamilton County Dept. of Educ. v. Deal, 546 U.S. 936 (2005), a unanimous Sixth Circuit held "we agree that the IDEA requires an IEP to confer a *meaningful* educational benefit." The defendant school district in Deal petitioned this Court for *certiorari* on the grounds that IDEA does not require a "meaningful" educational benefit. This Court denied *certiorari*. This Court apparently saw no reason to disturb the Sixth Circuit's reasoning that a "meaningful educational benefit" standard is applicable under the Act. Here, however, *certiorari* is being sought because the Tenth Circuit has blessed a *lower* standard of care.

A school district should not receive credit for providing a FAPE merely because a student has achieved "some" progress. This is particularly true here, where the student has been diagnosed with a pervasive developmental disorder (autism) that has negatively impacted the student on so many different levels.[8]

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[8] In John Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993), the Sixth Circuit employed an automotive analogy to rule that, under IDEA, school districts are required to supply the educational equivalent of a "serviceable Chevrolet" and not a "Cadillac." We agree. However, to adopt a "some benefit" standard of care where there are so many systems to assess and address is no different than allowing a car with defective brakes to pass inspection merely because the car was recently refitted with new tires. To focus on the supposed "benefit" of the new tires is to ignore more pressing problems.

Inasmuch as the student's individual needs and progress are the primary focus, FAPE must be measured from the perspective of the student's demonstrable acquisition of learning, and not merely the school district's reported efforts to try to teach the student. The key is what *expectation* may reasonably arise from the student's IEP. As always, the core issue is whether or not the IEP, as designed, is "reasonably calculated" to provide the student with a meaningful and lasting educational benefit.

The record (including three successive judicial determinations) reflects that Luke did not make overall meaningful educational progress in the public school program. If anything, Luke appeared to be getting worse. If there was any educational progress to point to, it was selective and *di minimus*.

While Luke's school district selectively pointed to Luke's ostensible attainment of one-fourth of his educational objectives as evidence of his "some progress," the record also showed that Luke had not learned fundamental life skills such as eating, toileting, sleeping, dressing and maintaining appropriate behavior. Luke's school district had not done much, if at all, to promote self-sufficiency and independence. The record reflects that Luke had not acquired even basic adaptive living skills. The record here reflects that Luke was smearing feces and ransacking his house in the evening.

Luke's parents are unlike those few parents who insist from the start on a private school setting, and who have made no *bona fide* effort to try to work with their school district in good faith. The record here shows that Luke's parents bent over backwards to try to work with their school system. It is no

wonder that Luke did so poorly in that program where, as here, Luke's school district embraced an unduly low standard of care that came with equally low expectations.

Two successive administrative decisions concluded that Luke's school district failed to provide him with a FAPE. The district court, giving due weight to such fact finding, agreed. In order to reverse the three prior determinations, the Tenth Circuit applied an impermissibly low standard of care.

There are, of course, no guarantees in life. However, without the support of IEP's that are at least "reasonably calculated" to meaningfully promote the generalization of skills, children with autism cannot hope to become self-sufficient or independent and their learning will not be real and lasting.

Without an IEP that is "reasonably calculated" to promote self-sufficiency and the generalization of skills being taught in isolation, a child with autism is merely being groomed for lifelong residential care. A "some benefit" approach may help to close a current school budget, and it might well be administratively convenient, but it will only cost far more in the long run, and here, the anticipated "costs" far transcend the obvious financial implications.

A "some benefit" standard is inconsistent with the requirements of the Act, and it is plainly inadequate for Luke and most other similarly situated children diagnosed with autism. Their "pervasive" needs require an equally pervasive

intervention approach. For children with autism, a "some benefit" standard barely scratches the surface.

ARGUMENT

I. CONGRESS IS INCREASINGLY TREATING AUTISM AS A NATIONAL PRIORITY

As the incidence of Autism Spectrum Disorder has mushroomed, Congress increasingly has treated Autism as a national priority. In recent years, autism has grown dramatically more prevalent. In 1961, it was confidently asserted that "[i]nfantile autism is a relatively rare form of schizophrenia and is not important from an epidemiological point of view." C.B. Ferster, *Positive Reinforcement and Behavioral Deficits of Autistic Children*, 32 CHILD DEVELOPMENT 437, 437 (1961), *reprinted in* CLASSIC READINGS IN AUTISM 53 (Anne M. Donnellan ed., 1985). Even in 1993, shortly after the Department of Education began collecting statistics on autism, it classified only 19,058 children between 6 and 21 as having autism.[9] *See* Office of Special Education and Rehabilitative Services, Department of Education, 26TH ANNUAL (2004) REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2006).[a] But in 2005, the Department of Education reported 192,643 autistic students between the ages of 6 and 21 – a

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[9] Autism was added as a specifically-identified category of disability under IDEA by the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, §101, 104 Stat. 1103, 1142 (1990). It is very difficult to determine the prevalence of autism before the 1990s.

more than tenfold increase. *See* Office of Special Education and Rehabilitative Services, Office of Special Education Programs, U.S. Department of Education, Data Analysis System (DANS), 1976-2005, *Table 1-3, Students ages 6 through 21 served under IDEA, Part B, by disability category and state: Fall 2005.*[b] The Centers for Disease Control report rates as high as 1 in every 150 children. Catherine Rice, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002*, 56 MORBIDITY AND MORTALITY WEEKLY REPORT SS-1, 12 at 12 (Feb. 9, 2007) ("CDC, *14 Sites Study*").[c] With some 24,000 children with autism born each year, autism is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease.[d] S. Rep. No. 109-318 at 3 (2006).

As the incidence of autism has grown, Congress increasingly has made autism research and education a national priority. Autism was specifically identified as a disability under IDEA in 1991. *See* 20 U.S.C. §1401(3)(a)(i); Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, Title I, §101, Title IX, §901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990). The Children's Health Act of 2000 directed the National Institutes of Health to expand and intensify autism research and mandated the creation of an Interagency Autism Coordinating Committee to coordinate autism research and other efforts within the Department of Health and Human Services. Children's Health Act of 2000, Pub. L. 106-310, Title I, 114 Stat. 1101 (2000). In 2004, IDEA was amended to encourage the Department of Education to support the development of programs to train special education

teachers in autism disorders, and provide technical assistance and in-service training to schools and personnel servicing children with autism spectrum disorders. 20 U.S.C. §1462(b)(2)(G), 20 U.S.C. §1463(c)(8)(D). *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004).

Most recently, Congress enacted the Combating Autism Act of 2006 to dramatically increase funding for autism research, detection and intervention and to promote interagency coordination of autism-related activities through the NIH. *See* Combating Autism Act of 2006, Pub. L. 109-416, 120 Stat. 2821 (2006); S. Rep. No. 109-318 at 18-20.

One day, perhaps one day in the not too distant future, scientists will identify the causes of autism. Until that day comes, however, there is an entire generation of children and adolescents who need and who are entitled to appropriate and effective intervention and educational programs. What we do with that generation now will have life-long consequences, one way or another.

II. WITH APPROPRIATE PLACEMENTS, PROGRAMMING AND SERVICES, MANY OF THE DEVELOPMENTAL DEFICITS ASSOCIATED WITH AUTISM CAN BE AMELIORATED AND REMEDIATED

Autism is a spectrum disorder encompassing a range of developmental disorders related to impaired social function, impaired communication and repetitive, stereotyped behaviors. The degree and manifestation of impairments can vary dramatically from individual to individual, and the spectrum of disorders includes ASD, Asperger's Disorder,

Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS") and Rett's Syndrome. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION at 69-75 (4th ed. 2000) ("DSM-IV-TR"); S. Rep. No. 109-318, 2-3 (2006). Most children with autism show an "inability to relate themselves in the ordinary way to people and situations from the beginning of life." Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted).

Impaired communication is another classic symptom of autism. Approximately 40 percent of children with autism do not speak, and others have difficulty learning to use language for communicative purposes. S. Rep. No. 109-318 at 2; DSM-IV-TR at 70. Many children with autism also demonstrate restricted and stereotypical patterns of behavior or interests, an insistence on predictability, and great difficulty coping with unexpected changes to their routine. S. Rep. No. 109-318 at 3; DSM-IV-TR at 71.

Symptoms generally manifest early, usually before the child's third birthday and as soon as eighteen months or earlier; in some cases symptoms are present almost from birth.[10] S. Rep. No. 109-318 at 3, 9; Autism Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, Department of Health and Human Services, AUTISM SPECTRUM

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[10] The Working Group was created by the Interagency Autism Coordinating Committee at the National Institute of Mental Health. S. Rep. No. 109-318 at 2.

DISORDERS ROADMAP (May 16, 2005) ("Roadmap").[e] Yet children with autism frequently are not identified until after they have entered the public school system. S. Rep. No. 109-318 at 3, 9; Roadmap at 8.[11]

While the cause or causes of autism are still unclear, there is broad agreement that the symptoms of autism often can be significantly ameliorated and remediated. Appropriate education offers the possibility that children with autism can achieve a great deal of self-sufficiency and become functioning, contributing members of society rather than permanent financial and emotional burdens on their families and on the public treasury.[12]

Parents cannot allow their child to languish in an inappropriate setting when every passing moment erodes potential benefits that can never be regained. For these children and their parents, "every moment counts." Laurie Tarkan, *Autism Therapy Is Called*

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[11] With a median age at diagnosis of 52-56 months, half of autistic children are not diagnosed until they are nearly 5 years old or later. Catherine Rice, *Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000*, 56 MORBIDITY AND MORTALITY WEEKLY REVIEW SS-1, 1 at 12 (Feb. 9, 2007). In some locations, the median age of diagnosis is 66 months, meaning that half of children diagnosed with autism are not identified until after they are more than 5 ½ years old. CDC, *14 Sites Study* at 20.

[12] For descriptions of autistic children who have grown into productive – even remarkable – adults, *see, e.g.*, Oliver Sacks, AN ANTHROPOLOGIST ON MARS 244-296 (1995); Clara Claiborne Park, EXITING NIRVANA (2001); Stephen M. Shore, BEYOND THE WALL (2001); Kamran Nazeer, SEND IN THE IDIOTS (2006).

Effective, but Rare, N.Y. TIMES, Oct. 22, 2002 (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism don't have access to appropriate treatment)[f]; *see also* County Sch. Board of Henrico County v. R.T., 433 F. Supp. 2d 692, 696 (E.D.Va. 2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children with autism can't afford to waste a second... With the right kind of early intervention, they can learn. Without it, there's no hope." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted).[g] Forcing a child with autism to remain in a placement or program that is not genuinely working can have a calamitous and irreparable impact on the long-term development of the child, a decision no parent should have to make.

III. CONGRESS HAS RECOGNIZED INDEPENDENCE AND SELF-SUFFICIENCY AS IMPORTANT EDUCATIONAL GOALS UNDER THE IDEIA

Autism is universally recognized as a *pervasive* developmental disorder that significantly impacts behavior, communication and socialization. By focusing so rigidly on a few, highly selective "academic" measures and by invoking its "some benefit" standard, the Tenth Circuit was looking at Luke and his unique needs through an unduly narrow lens. Congress, taking a broader view has expressly recognized in the Act, as part of an important "national policy," that "self-sufficiency" and independence are *educational* goals and outcomes for *all* children with eligible disabilities. 20

U.S.C. §1400(c)(i), entitled "Congressional Findings and Purpose," provides in pertinent part: "Improving educational results for children with disabilities is an essential element of our national policy of ensuring...independent living and economic sufficiency."

Similarly, 20 U.S.C. §1400(d) provides that one of the stated "purposes" of the Act is: "[T]o ensure....services designed to meet their unique needs and prepare them for employment and independent living." We respectfully urge that the Tenth Circuit glossed over these important purposes.

Once there has been a FAPE deprivation (as the record reveals here) the district court's inquiry on Prong II properly focused on whether or not Boston Higashi is appropriate, i.e., whether it is designed to be effective and provide a meaningful educational benefit to Luke. The record firmly supported three successive judicial determinations that Boston Higashi is "appropriate" and thus reimbursable under the Burlington/Carter test. Sch. Comm. of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359 (1985); Florence County Sch. Dist. IV v. Carter, 510 U.S. 7 (1997).

IV. THE TENTH CIRCUIT DEPRIVED LUKE AND OTHER SIMILARLY SITUATED STUDENTS THEIR RIGHT TO A "MEANINGFUL EDUCATIONAL BENEFIT" STANDARD

Apart from the Tenth Circuit, the Circuits seem to agree on the basic principles that guide the analysis of whether a disabled child has been provided a FAPE. In order to provide a FAPE, the IEP must be "reasonably calculated" to provide a

"meaningful benefit." This is not to say that the IEP is "guaranteed" to provide a "meaningful benefit," but simply that it must be "reasonably calculated" to allow the child to make meaningful progress.

It is well settled among all the Circuits that states are not required to maximize a disabled child's ability to fulfill his or her full academic potential. The IDEIA requires that the individual child's unique and individual characteristics and capabilities be considered when evaluating whether he or she has received a FAPE. The Tenth Circuit erred in equating "meaningful benefit" with a guaranteed result or optimal benefit.

The issue may partly be the product of semantics. In applying Rowley, various Circuit courts have used the terms "some benefit" and "meaningful benefit" interchangeably. Rowley interpreted the Education for All Handicapped Children Act ("EHA"), which, after revision, was renamed as the Individuals with Disabilities Education Act, *i.e.*, IDEA.

In 1997, Congress amended the IDEA, obligating schools to provide children with disabilities with more than "some educational benefit," representing a significant shift in the focus of the disability education program. The focus was no longer to simply provide access, but to ensure that a child could attain a "meaningful benefit" once educational access was provided.

This shift is also evident in circuit decisions interpreting Rowley since 1997. The Ninth Circuit recently recognized that the circuits often use "some benefit" and "meaningful benefit" interchangeably,

and further that *meaningful* benefit was the appropriate standard as a result of the 1997 amendments to the IDEA. N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1212-13 (9th Cir. 2008). A survey of circuit courts shows that the vast majority adheres to the "meaningful benefit" standard, and defines such standard as more than "some benefit" as defined by the Tenth Circuit in this case.[13]

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[13] *See* Mrs. B. v. Milford Board of Educ., 103 F.3d 1114, 1120 (2nd Cir. 1997) ("While the Act does not authorize a court to impose a particular substantive educational standard on the state or to require equality of opportunity for the handicapped in education, a state IEP must be reasonably calculated to provide some meaningful benefit.") (internal citations omitted); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182, 184 (3d Cir. 1988) (The IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning," and confer "meaningful benefit."); James Hall v. Vance County Board of Educ., 774 F.2d 629, 636 (4th Cir. 1997) ("Clearly, Congress did not intend that a school system could discharge its duty...by providing a program that produces some minimal academic advancement, no matter how trivial."); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000) ("[W]e set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA."), Deal v. Hamilton County Board of Educ., 392 F.3d 840, 862 (6th Cir. 2004) ("[W]e agree that the IDEA requires an IEP to confer a meaningful educational benefit gauged in relation to the potential of the child at issue"); Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011 (8th Cir. 2006) ("Accordingly, we are satisfied he was provided with meaningful educational benefit."); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("The district court should have asked the more pertinent question of whether the [program] was appropriately designed and implemented so as to convey...a meaningful benefit."); S.S. v.

Here, the Tenth Circuit erroneously concluded that because Luke had made "some progress" in a selective sense that he made appropriate progress. Unfortunately, the Tenth Circuit glossed over three successive fact findings that found not only little progress, but in fact, regression.

Although the Tenth Circuit ostensibly invoked the standard first enunciated by this Court in Rowley, the Tenth Circuit failed to fully and accurately *apply* the Rowley standards. This Court in Rowley set forth the requisite analysis, and made clear that an individualized educational approach that recognizes the child's "unique needs" is precisely what is statutorily mandated. Rowley, 458 U.S. at 181, 187, 188-89, 194, 198. The educational approach must be one that is "reasonably calculated" to provide the student with educational benefit.

It is clear that, "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency" is a goal at the heart of the IDEIA. *See* 20 U.S.C. §§ 1400 (c)(i), 1401. With our nation in fiscal crisis, independent living and economic self-sufficiency are even more critical.

Generalizing skills across various domains, carrying over what is learned at school and transferring those skills into the home and community, is an integral part of developing self-

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Howard Road Academy, 2008 U.S. Dist. LEXIS 95501 (D.C. 2008) ("[T]he Court must ask whether the IEP was appropriately designed and implemented so as to convey a meaningful benefit to S.S.").

sufficiency and paving the way for independent living.

Although the Tenth Circuit has protested that its hands are tied by the law, such is not the case. Here, the Tenth Circuit has tied its own hands behind its back. It is essential that this Court grant *certiorari* so that it may clarify the applicable substantive standard under IDEA. This Court should clarify that the applicable standard is one requiring an IEP that is at least "reasonably calculated" to provide a meaningful and lasting educational benefit.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Autism Speaks, respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] We also gratefully acknowledge the assistance of Jennifer M. Frankola and Brianne N. Dotts, law graduates currently awaiting admission.

ENDNOTES

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[a] Available at http://www.ed.gov/about/reports/annual/osep/2004/26th-vol-2.pdf (accessed December 22, 2008).

[b] Available at http://www.ideadata.org/tables29th/ar_1-3.xls (accessed December 22, 2008).

[c] Available at http://www.cdc.gov/mmwr/PDF/ss/ss5601.pdf (accessed December 22, 2008).

[d] Available at http://www.genome.gov/10001204 (Down, cystic fibrosis, hemophilia, sickle cell disease); http://ndep.nih.gov/diabetes/youth/youth.htm (diabetes); http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf (cancer) (all sites accessed December 22, 2008).

[e] Available at http://iacc.hhs.gov/reports/2005/services-subcommittee-report-may16.shtml (accessed December 22, 2008).

[f] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9C05E0D71F3DF931A15753C1A9649C8B63 (accessed December 22, 2008).

[g] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9503E2D9143AF936A15757C0A96F958260 (accessed December 22, 2008).